



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

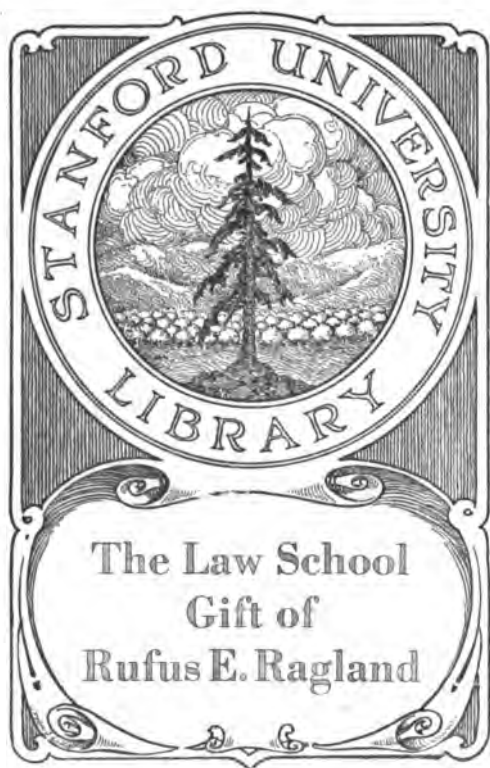
We also ask that you:

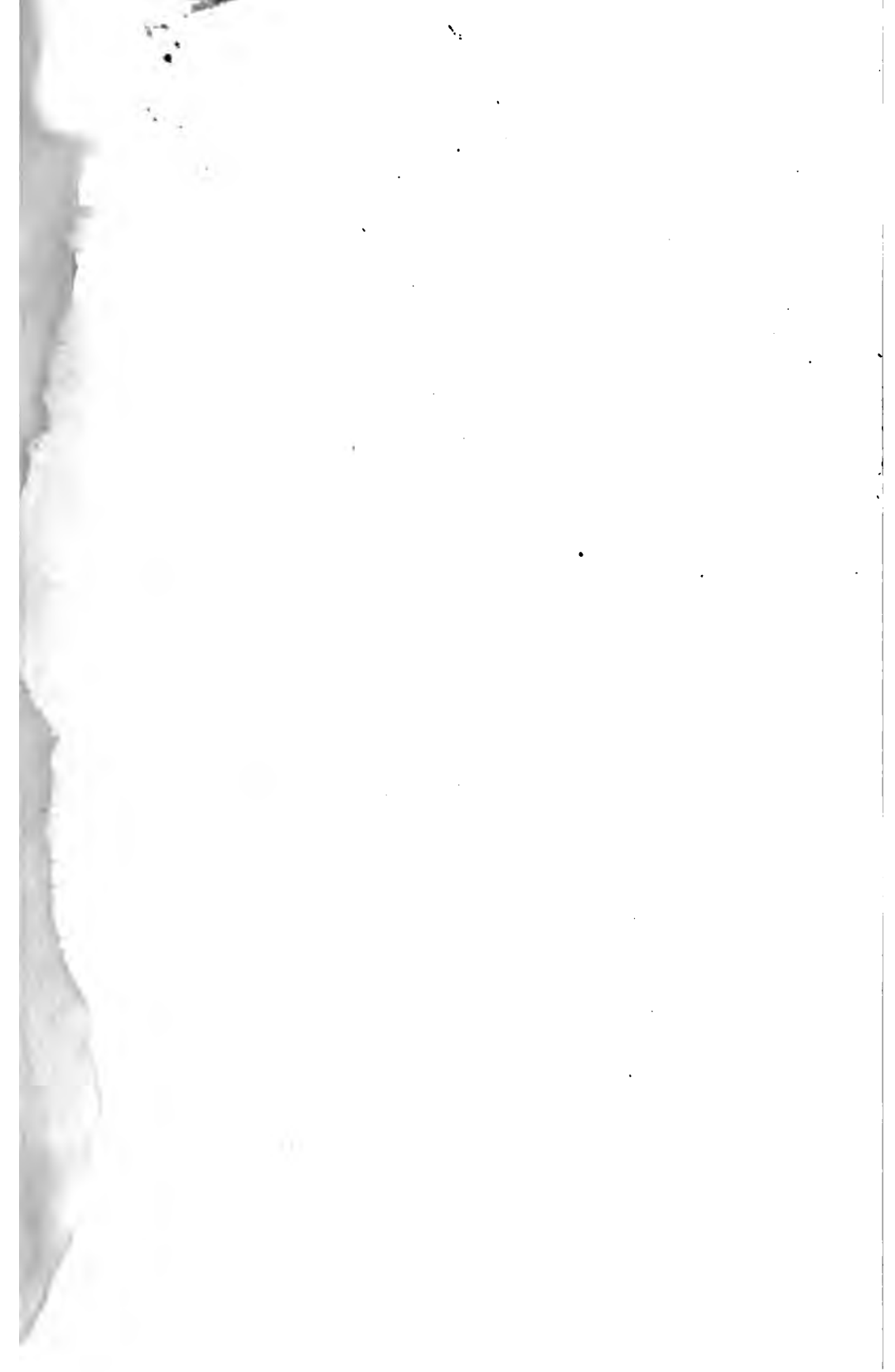
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

WIS & BLOOD
— LAW —
BOOKSELLERS
&
PUBLISHERS
73 NASSAU ST.
N.Y.





John Reynolds
San Francisco
ENGLISH REPORTS 1857

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT AND CHAUNCEY SMITH,
COUNSELLORS AT LAW.

VOLUME VIII.

Containing Cases in the House of Lords, in all the Courts of Equity, Bankruptcy, and Common Law, and Crown Cases Reserved, during the years 1851 and 1852.

BOSTON:

LITTLE, BROWN AND COMPANY.

1852.

Entered according to Act of Congress, in the year 1852, by
LITTLE, BROWN AND COMPANY,
In the Clerk's Office of the District Court of the District of Massachusetts.

L 1315

APR 7 1930

YRABUJ OROTHAT

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

STEREOTYPED
BY STONE AND SMART.

JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

THE SEVERAL COURTS OF CHANCERY.

Right Hon. Lord TRURO, Lord High Chancellor.

Right Hon. Sir JOHN ROMILLY, Master of the Rolls.

Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., } Lords Justices of
Right Hon. Lord CRANWORTH, } The Court of Appeal.

Right Hon. Sir GEORGE JAMES TURNER, Knt., }
Right Hon. Sir JAMES PARKER, Knt., } Vice-Chancellors.
Right Hon. RICHARD KINDERSLEY,

QUEEN'S BENCH.

Right Hon. Lord CAMPBELL, Lord Chief Justice.

Sir JOHN PATTESON, Knt.

Sir JOHN TAYLOR COLERIDGE, Knt.

Sir WILLIAM WIGHTMAN, Knt.

Sir WILLIAM ERLE, Knt.

COMMON PLEAS.

Right Hon. Sir JOHN JERVIS, Knt., Lord Chief Justice,

Sir WILLIAM HENRY MAULE, Knt.

Sir CRESSWELL CRESSWELL, Knt.

JUDGES OF THE SEVERAL COURTS.

Sir EDWARD VAUGHAN WILLIAMS, Knt.

Sir THOMAS NOON TALFOURD, Knt.

EXCHEQUER.

Right Hon. Sir FREDERICK POLLOCK, Knt., Lord Chief Baron.

Right Hon. Sir JAMES PARKE, Knt.

Sir EDWARD HALL ALDERSON, Knt.

Sir THOMAS JOSHUA PLATT, Knt.

Sir SAMUEL MARTIN, Knt.

COURT OF CRIMINAL APPEAL.

THE FIFTEEN JUDGES OF THE QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER.

BANKRUPTCY.

THE LORDS JUSTICES AND THE FULL COURT OF APPEAL.

COURT OF ARCHES AND PREROGATIVE COURT.

Right Hon. Sir HERBERT JENNER FUST.

CONSISTORY COURT AND ADMIRALTY COURT.

Right Hon. STEPHEN LUSHINGTON, D. C. L.

Sir A. J. E. COCKBURN, Knt., Attorney-General.

Sir WILLIAM PAGE WOOD, Knt., Solicitor-General.

Sir JOHN DODSON, D. C. L., Queen's Advocate-General.

JOSEPH PHILLIMORE, D. C. L., Admiralty-Advocate.

T A B L E

OF

ONE HUNDRED AND FORTY-SEVEN CASES

CONTAINED IN

VOLUME VIII.

	PAGE
Andrews v. Eaton,	561
(Arbitration—3 & 4 Will. 4, c. 42, s. 39—Enlargement of time for making the Award.)	
Arnold v. Goodered,	332
(Practice—Staying Proceedings—Payment of Debt and Costs.)	
Asplin v. Blackman,	524
(County Court—Concurrent Jurisdiction, &c.—Discretion of Judge—Order for Costs—9 & 10 Vict. c. 95, s. 12—13 & 14 Vict. c. 61, s. 13.)	
Attorney-General v. The Birmingham and Oxford Junction Railway Company, The Great Western Railway Company, and The Birmingham, Wolverhampton, and Dudley Railway Company,	243
(Attorney-General—Railway Company—Injunction—Completion of whole Line.)	
Bailey v. Bolt,	51
(Legacy-Duty.)	
Baxter v. Losh,	274
(Legacy—Lapse—Residuary Estate—Joint Bequest—Survivorship—Implication.)	
Bellamy v. Majoribanks,	513
(Banker—Crossed Check—Negligence.)	
Biles, <i>ex parte</i> ,	99
(Will—Class—Lapse—Trustee Act—Costs.)	

Bligh v. Tredgett,	79
(Practice—Next Friend—Costs.)	
Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Company and S. Bowler,	143
(Injunction—Power to restrain parties from doing unlawful Acts—Want of Power to undo what has been done.)	
Bolton v. Powell,	165
(Bill to enforce administration Bond.)	
Brettle v. Dawes,	539
(Company—Winding-up Act, 11 & 12 Vict. c. 45—Interim Manager—Staying proceedings in Action against Company.)	
Bridgman v. Dean,	534
(Accord and Satisfaction—Assumpsit—Consideration—Plea of no signed Bill, Sufficiency of.)	
Briggs v. Penny,	231
(Will—Trust—Precatory words, "well knowing.")	
Briggs v. The Earl of Oxford,	194
(Demurrer—Injunction to restrain Tenant for Life without Impeachment of Waste from cutting Timber, where Trustees had Power inconsistent with his Right, and to which it was expressly made subject.)	
Bromage v. Vaughan,	562
(Writ of Sequestration—Fi. Fa.—Return—Irregularity—Time for setting aside.)	
Bryan's Trust, ex parte,	253
(Will—Construction— <i>Persona Designata</i> —Second Husband.)	
Burbidge v. Cotton,	57
(Friendly Societies—Usury.)	
Burgess v. Sturgis,	270
(Claim—Foreclosure—Parties—Mortgagees.)	
Burmester v. Norris,	487
(Mining Company—Power of Directors to borrow money.)	
Buxton v. James,	155
(Copyright—Injunction.)	
Carter, ex parte,	112
(Bankruptcy—Annuling Adjudication—Commissioner's Jurisdiction—12th, 104th, and 233d Sections of the Bankrupt Law Consolidation Act.)	
Castello, in re,	280
(Bankrupt Law Consolidation Act, 1849—Advertisement of Adjudication.)	
Clack v. Sainsbury,	408
(Usury—Exemptions—Bills at Three Months—Security on Land—Statutes 12 Anne 2, c. 16, s. 1; 3 & 4 Will. 4, c. 98, s. 7; 2 & 3 Vict. c. 37, s. 1.)	

TABLE OF CASES.

vii

Cheetham, <i>in re</i> ,	279
(Bankrupt Law Consolidation Act, 1849—Jurisdiction—Payment of Money out of Court.)	
Clarke, <i>in re</i> ,	37
(Attorney and Client—Costs of Action improperly brought—Powers of Taxing Master—Costs of Appeal when Judges of this court differ.)	
Cleave <i>v.</i> Jones,	554
(Attorney and Client—Privileged Communication—Collateral Issue—Duty of Judge.)	
Clements <i>v.</i> Bowes,	238
(Public Company—Parties—Directors—Winding-up Act.)	
Collingridge <i>v.</i> Paxton,	402
(Levy—1 & 2 Vict. c. 110, s. 12—Bank-Notes.)	
Conway's Case,	250
(Contributory—Upfall's Case.)	
Corsar <i>v.</i> Reed,	380
(Error—Bill of Exceptions—Nonsuit—Plaintiff's Right to appear.)	
Cottee <i>v.</i> Richardson,	498
(Lease—Merger—Assignment operating as New Lease.)	
Dobson <i>v.</i> Brocklebank,	543
(Judgment as in Case of Nonsuit—Delay after Removal of Injunction.)	
Doe d. Dixie <i>v.</i> Davies,	510
(Mortgage—Tenancy at Will.)	
Doe d. Lansdell <i>v.</i> Gower,	317
(Notice to Quit after Disclaimer—Lease by Parish Officers—Stat. 59 Geo. 3, c. 12, s. 17—"Lease in Writing"—Stat. 3 & 4 Will. 4, c. 27, ss. 5, 8.)	
Driscoll <i>v.</i> Whalley,	355
(Judgment as in the Case of Nonsuit—Affidavit.)	
Earl of Glasgow and John Wilson & Sons, Appellants, <i>v.</i> Hurler and Campsie Alum Company, and John King, Respondents,	13
(Bill of Exceptions—Mines.)	
Edwards <i>v.</i> The Great Western Railway Company,	447
(Railway—Carriers—Equality of Charges—"Like Circumstances—Scale Bills—Goods aggregate of "Class or Kind"—Different Consignees—Deductions—Allowances—Interest.)	
Emmet <i>v.</i> Dewhirst,	83
(Specific Performance—Composition on Another's Debts—Release by a given day—Mistake in Law—Right to retain Securities—Statute of Frauds, Sect. 4.)	
Faviel <i>v.</i> Gaskoin,	526
(Landlord and Tenant—Out-going Tenant—Custom of Country—Special Agreement.)	

Fenn v. Bittleston,	483
(Trover — Mortgage of Goods — Determination of Bailment.)	
Fletcher & Yates, ex parte,	205
(Liability of Trust Property — Right to begin.)	
Frith v. Wollaston,	559
(Colonial Judgment, Action on — Colonial Insolvency — Suspension of Execution — Discharge.)	
Fyfe v. Swaby,	184
(Bill to restrain the Registration of Shares — Demurrer — Multifariousness — Injunction — 26th Section of Stat. 7 & 8 Vict. c. 110.)	
Gavin v. Allan,	575
(Judgment as in Case of Nonsuit — Insolvent — Stet Processus.)	
Gay, ex parte,	173
(Call — Contributories — Costs.)	
Gooch v. Gooch,	147
(Equitable Mortgage — Deposit of Title-Deeds — Lien upon Estate — Gift.)	
Gooch v. Gooch,	138
(Construction of Will — Remoteness.)	
Gore v. Harris,	141
(Evidence — Demurrer by Witness to Interrogatory, on the ground of Privilege.)	
Gough v. Tindon,	507
(Promissory Note — Delivery after Death of Maker — Account stated — Payment under mistake as to legal Liability.)	
Grizewood v. Blane,	415
(Pleading — Gaming under 8 & 9 Vict. c. 109, s. 18 — Generality — Differences on Sale of Shares.)	
Hall v. The Norfolk Estuary Company,	351
(Deed of Transfer of Shares void, Call being unpaid — 8 & 9 Vict. c. 16, s. 19 — Registration of Deed of Transfer.)	
Hall, ex parte,	51
(Costs — Alleged Contributory — Official Manager — 11 & 12 Vict. c. 45, ss. 104, 118.)	
Ham's Will,	99
(Will — Class — Lapse — Trustee Acts — Costs.)	
Harris, in re,	537
(Legacy — Liability of Executor to account — Trust for Children.)	
Harrison v. Masselin,	64
(Practice.)	
Harrison v. The Great Northern Railway Company,	469
(Covenant — Contract of Company — Discretion of Engineer — Pleading — Readiness and Willingness.)	

TABLE OF CASES.

ix

Harrison v. Randall,	209
(Trustee and Cestui que Trust.)	
Hart v. Eastern Union Railway Company,	544
(Railway Company—Mortgage Deed—Property Mortgaged—Principal Money, Right of Action for—Companies Clauses Consolidation Act, § 9 Vict. c. 16, ss. 42, 50, and 53—Local Acts, Construction of.)	
Hartnall's Will, in re,	171
(Trustee Act, 1850, s. 23—"Sole Trustee"—Construction.)	
Hawcroft v. The Great Northern Railway Company,	362
(Railway Company—Excursion Tickets—Special Contract.)	
Hodgson v. Earl of Powis,	257
(Railway Company—Injunction.)	
Holthouse, in re,	277
(Bankrupt Law Consolidation Act, 1849—Certificate—Appeal—Notice of Opposition.)	
Hope v. Beadon,	326
(Notice to produce—Second Trial.)	
Howard v. Earle,	165
(Bill to enforce Administration Bond.)	
Imperial Salt and Alkali Company, in re,	49
(Winding-up Acts—Reserved Bidding at Sale of Company's Property—Notice to Contributors.)	
Imperial Salt and Alkali Company, in re; ex parte Slattery,	133
(Winding-up Act, 1848—Right of Contributors to attend Proceedings in the Master's Office.)	
Innes v. Sayer,	157
(Powers—Will—Defective Execution aided in Favor of Charities.)	
Isaacs v. Wyld,	491
(County Court—Claim above 50 <i>l.</i> —Abandonment of Excess; when to be made.)	
Justice, Appellant, v. Gosling, Respondent,	475
(Trespass—False Imprisonment—Arrest by Police Constable—Charge of Furious Driving—Conviction—County Court Appeal.)	
Lancashire and Yorkshire Railway Company v. East Lancashire Railway Company,	564
(Railway Company—Tolls—Construction of Agreement.)	
Lawrence v. Boston,	494
(Mortgage—Stamp Act, 55 Geo. 3, c. 184, Sched. Part 1, "Mortgage"—Policy of Insurance.)	
Leslie v. Smith,	97
(Practice—Claim—Parties—Order 7, of April, 1850.)	

Levinson v. Syer,	378
(Warrant of Attorney — Attestation by Attorney named in the Warrant — Issuing Execution for Plaintiff.)	
Lodge v. Prichard,	121
(Evidence — Professional Confidence.)	
London and Blackwall Railway Company, Appellants, v. The Rev. John Letts, Respondent,	1
(Tithes — City of London — "Assessment.")	
Loveday, ex parte,	235
(Lunatic — Costs of Inquisition on a successful Traverse.)	
Lushington v. Boldero,	265
(Waste — Timber — Money in Court — Accumulations, Right to — Settled Estates.)	
Mackenzie v. Mackenzie,	67
(Policies of Insurance — "Executors and Administrators" — Insolvency.)	
Mather v. Norton,	255
(Will — Construction — Power of Sale — Charge of Debts.)	
Miller v. Huddleston,	26
(Will, Construction of — Annuities — Priority.)	
Montagu v. Smith,	329
(Special Jury — 5 Geo. 4, c. 50, s. 30 — Mistrial by Common Jury.)	
Monypenny v. Dering,	42
(Will — Shifting Clause — Construction.)	
Neate v. Pink,	205
(Liability of Trust Property — Right to begin.)	
Nicholl v. Chambers,	423
(Vendor and Purchaser — Conditions of Sale — Description of Parcels — Identity — Quantity.)	
Nixon v. Phillips,	531
(Usury — Bill of Exchange — 3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, s. 1.)	
Orchard v. Moxsy,	349
(Application for Costs after Summons dismissed at Chambers — Sect. 13 of Stat. 13 & 14 Vict. 61 — Lapse of two Terms.)	
Osborn v. Morgan,	192
(Wife's Equity to a Settlement — Reversionary Chose in Action.)	
Overton v. Freeman,	479
(Contractor and Subcontractor — Contractor not liable for Negligence.)	
Parker v. The Great Western Railway Company,	426
(Railway — Carriers — Charges — Loading — Inequality — Allowance — Money had and received — Scale-bill — Classification of Goods — Small Parcels — Charge for Conveyance — Goods of Like Nature.)	

TABLE OF CASES.

xi

Pennant and Craigwen Consolidated Lead Mining Company, <i>in re</i> ,	150
(Petition for Winding-up Order — Company within the Acts.)	
Piddocke v. Smith,	95
(Lunatics — Guardian <i>ad Litem</i> to, without Commission.)	
Poole v. Pain,	314
(Notice of Trial — Striking out Similiter — Reg. Gen. H. T., 2 Will. 4, r. 59.)	
Potter v. Baker,	262
(Will — Construction — Perpetual Annuity.)	
Price v. Griffith,	72
(Ambiguous Agreement — Undivided Moiety.)	
Price v. Price,	271
(Deed — Voluntary Conveyance — Gift — Baron and Feme — Constructive Trust.)	
Regina v. Aldham and United Parishes Insurance Society,	368
(Friendly Society — 10 Geo. 4, c. 56, s. 9 — General Meeting — Public No- tice — Signature of Officer.)	
Regina v. Brown,	321
(Vagrant Act, 5 Geo. 4, c. 83, s. 4 — Apprehension of suspected Persons fre- quenting Streets and Highways.)	
Regina v. Cheafor,	598
(Larceny — Pigeons in a Dove-Cote.)	
Regina v. Chichester,	294
(Indictment for Nuisance — Judgment by Default — Sentence not to be pro- nounced on Defendant when Absent.)	
Regina v. Gaskell,	298
(Poor Rate — Library and News-Room — Liability to Taxation.)	
Regina v. Hammond,	356
(Election of Councillor — 5 & 6 Will. 4, c. 76, s. 32 — Meaning of "Place of Abode" of Candidate in Voting Paper.)	
Regina v. Key,	584
(Practice — Mode of Proceeding upon Indictment charging previous Con- viction — 14 & 15 Vict. c. 19, s. 9.)	
Regina v. Master, Fellows, and Assistants of the College of God's Gift in Dulwich,	385
(Corporation — College — Statutes, Construction of — Right of voting for Corporate Officer — Charter — Delegation of Powers by Crown — Usage.)	
Regina v. Mayor and Assessors of Hartlepool,	303
(Burgess List — 5 & 6 Will. 4, c. 76, s. 17.)	
Regina v. Murdock,	577
(Embezzlement — Venue.)	

Regina v. Percy,	365
(Form of Bastardy Order when no Evidence is tendered by Defendant—8 & 9 Vict. c. 10, Sched. No. 8—Corroborating Evidence—7 & 8 Vict. c. 101, s. 3.)	
Regina v. Philpotts,	580
(Perjury—Evidence—Materiality.)	
Regina v. Preston,	589
(Larceny—Lost Goods—Taking.)	
Regina v. Shrimpton,	587
(Practice—Previous Conviction in reply to evidence of Character.)	
Regina v. Shuttleworth,	584
(Practice—Previous Conviction—14 & 15 Vict. c. 19, s. 9.)	
Regina v. St. Michael's, Pembroke,	311
(Order of Removal—Abandonment—11 & 12 Vict. c. 31, s. 8.)	
Regina v. Vann,	596
(Nuisance—Neglect of Parent to bury his Child—Ability—Offer by Guardians of money by way of loan.)	
Regina v. Waverton, the Inhabitants of,	344
(Indictment for Non-repair of Highway—Misdescription of Part out of Repair—Defective averments in second Count cured by Reference to first.)	
Regina v. Yorkshire, The Justices of the West Riding of	294
(Mandamus—Notice of Appeal—Application for Copy of Depositions—11 & 12 Vict. c. 31, s. 9.)	
Reynell v. Sprye,	35
(Production of Documents.)	
Roe v. Fuller,	553
(Pleading—Several Pleas—Joint-Stock Banking Company—Public Officer.)	
Ruffey v. Henderson,	305
(Landlord and Tenant—Parol License to enter Premises after Expiration of Tenancy—Trover—Fixtures.)	
Russell v. Jackson,	89
(Evidence—Professional Communications—Privilege.)	
Ryan v. Shilcock,	503
(Distress, when Wrongful—Opening outer Door.)	
Schofield v. Cahuac,	55
(Will—Construction—Beneficial Interest.)	
Simpson v. Chapman,	48
(Materiality of Discovery of Relief prayed—Exceptions for Scandal to material Discovery overruled.)	
Slattery, ex parte,	133
(Winding-up Acts—Contributory.)	

TABLE OF CASES.

xiii

South Staffordshire Railway Company v. Hall,	229
(Injunction — Legal Right acquired pending Injunction.)	
Smeathman v. Bray,	46
(Claim — Foreclosure — Form of Order — Inquiry — Incumbrances.)	
Soltan v. De Held,	132
(Practice — Motions.)	
Spotland v. Halifax,	295
(Mandamus — Notice of Appeal.)	
Stainton v. Chadwick,	105
(Discovery — Title — Fraud in obtaining an Order for the Conveyance of an outstanding Legal Estate.)	
Stanton, ex parte,	283
(Bankruptcy — 12 & 13 Vict. c. 106, s. 257 — Judgment Certificate — Construction of Act of Parliament.)	
Terrell, ex parte,	64
(Winding-up — Claim — Solicitor — Personal Liability.)	
Tetley v. Taylor,	370
(Bankrupt — Consolidation Act, 1849 — 12 & 13 Vict. c. 106, ss. 234, 235, 230 — Arrangement by Deed — Composition Deed — Distribution of Estate.)	
Tharrett v. Trevor,	508
(Attorney — Undertaking — Lien.)	
Thicknesse v. Acton,	47
(Practice — Attachment — Married Woman.)	
Thistlethwayte v. Garnier,	204
(Practice — Setting down amended special Case.)	
Turner v. Turner,	137
(Motions — Practice.)	
Tyler's Trust,	96
(Construction of Section 32, of the Trustee Act, 1850 — "Existing Trustees.")	
Underwood, in re,	508
(Attorney — Undertaking — Lien.)	
Watts v. Symes,	247
(Mortgagor and Mortgagee — Transfer of Mortgage — Tacking.)	
Wedlake v. Sargent,	404
(Summons and Particulars, Sufficiency of — Time for taking Objection to same — Release — Evidence of Fraud.)	
White v. Smith,	77
(Will — Devise of Real Estate upon Trust to be sold — Devisee takes as personalty.)	

Wickens <i>v.</i> Goatley,	420
(Insolvency—1 & 2 Vict. c. 110—Petition—Contents—Pleading—Generality—Jurisdiction.)	
Williams, <i>ex parte</i> ,	336
(Summons to appear before Justices—What Service sufficient.)	
Wood <i>v.</i> Sutcliffe,	217
(Injunction—Action—Stream.)	
Woolmer, <i>ex parte</i> ,	128
(Petition to discharge Winding-up Order.)	
Wright <i>v.</i> Barlow,	125
(Practice—Dismissal of Bill against useless Defendant—Costs.)	
Yates <i>v.</i> Madden,	178
(Will—Annuity, whether Perpetual or for Life.)	
Yates, the Trusts of, <i>in re</i> ,	224
(Will—Construction of Executory Bequest in Case of a Legatee dying before "being entitled in Possession.")	
Young <i>v.</i> Master, Fellows, and Scholars of Clare Hall,	337
(Tithe Commutation Act—Payment for Tithes and Glebe—Invalid Modus.)	

CASES
ARGUED AND DETERMINED
IN THE
HOUSE OF LORDS

DURING THE YEARS 1850-51.

THE LONDON AND BLACKWALL RAILWAY COMPANY, Appellants, v. THE
REV. JOHN LETTS, Respondent.¹

March 10 and August 8, 1851.

Tithes — City of London — "Assessment."

The clergy of the city of London were, by a decree made under the authority of an act of parliament, 37 Hen. 8, c. 12, declared entitled to 2s. 9d. in the pound of the rent by the year of all houses, shops, &c., as and for tithe. The Blackwall Railway Company's act empowered that company to remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them from the railway taking down houses, &c., and until new houses should be erected on the ground which should be cleared, of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers, "according to the last assessment thereof to the 25th March last," and such sum or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company:—

Held, reversing the decision of Wigram, V. C., that where there had been an agreed rent but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound; that the object of the act was only to give *indemnity* to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the *amount* of tithes to be paid to the 25th March, 1839, had been understood, agreed, and settled.

Held, also reversing the decision of Wigram, V. C., that the amount of tithe payable by the company was to be credited with the tithes actually *payable* to the rector in respect of new houses, and not merely with the sums actually *received* by the rector in respect of such new houses.

Held, affirming Wigram, V. C., that the word "assessment" did not mean the assessment to the poor-rate.

THIS was an appeal from a decision of Vice-Chancellor Wigram, dated the 9th February, 1847, made in a suit in which the present respondent was plaintiff, and the appellants defendants. The case is reported 11 Jur. 669. The bill stated, that by a decree made by

¹ 15 Jur. 995. Before the LORD CHANCELLOR, Lord BROUGHAM, and other Lords.

The London and Blackwall Railway Company v. The Rev. John Letts.

the then Archbishop of Canterbury and other persons, bearing date the 24th February, 1545, made under the authority of an act of parliament, 37 Hen. 8, c. 12, intituled, "An Act for Tithes in London," it was provided, "that the citizens and inhabitants of the said city of London, and the liberties of the same for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following, that is, to wit, of every 10s. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberty of the same, 1s. 4d.; and of every 20s. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them, within the said city and liberties, 2s. 9d.; and so, above the rent of 20s. by the year, ascending from 10s. to 10s., according to the rate aforesaid. Item — that where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin reserving less rent than hath been accustomed or is, or that any such lease shall be made without any rent reserved upon the same by reason of any fine or income paid beforehand, or by any fraud or covin, that then in every such case the tenant or farmer, tenants and farmers thereof, shall pay for his or their tithes of the same after the rate aforesaid, according to the quality of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them, were last letten for, without fraud or covin, before the making of such lease. Item — that every owner or owners, inheritor or inheritors, of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate, for tithes, as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin." The bill then stated, that, according to the true construction of such decree, the plaintiff was entitled to receive 2s. 9d. in the pound for tithes upon the annual value of all houses, shops, warehouses, cellars, &c., situate within the said parish; and that he had actually received payments after that rate in respect of divers premises, while, in respect of other premises, he had from time to time wholly or partially remitted such payments: that, previous to the induction of the plaintiff, the annual value of the tithable premises in the parish had been assessed by agreement between the successive rectors and the inhabitants or occupiers, and the plaintiff had adopted the last assessment so made, and continued to collect his tithes thereon until a change in occupation took place, whereupon the value of the premises was assessed by agreement, and the tithes collected upon such new assessment; and that, in making such assessment, the amount at which the premises were assessed to the poor-rate was generally resorted to by the plaintiff for the value of the premises: that by the acts 7 Will. 4, c. 118, and 2 & 3 Vict. c. 95, the Blackwall Railway Company was incorporated; and the 62d section of the last-mentioned act provided, that, for indemnifying (among others) the Rector of St. Olave's, Hart street, his successors, heirs, and assigns,

against such loss as might otherwise accrue to them from the railway company taking down, under the powers of their acts, any houses or other buildings, "after the owners or occupiers of any of the houses or other buildings to be taken down for the purposes or under the powers of this act, or the acts recited in it, within the said parish, any or either of them, should have quitted the possession thereof in pursuance of this act, or in pursuance of any notice to be given or left for that purpose under the powers or provisions of this act or the said recited acts, and in the meantime, and until new houses or other buildings should be erected, completed, and occupied on the ground which should be cleared under any of the provisions of this or the said recited acts, within the said parishes, any or either of them, or on some part thereof, of such an annual rent or value that the tithes, or yearly sums of money by way or in lieu of tithes, for the time being actually payable for such new houses or other buildings, should be fully equal to the tithes, or yearly sums of money by way or in lieu of tithes, payable for the houses or other buildings for the time being quitted by the occupiers thereof as aforesaid, within the said parishes, or any or either of them; the tithes, or yearly sums of money or customary payments in lieu of tithes, payable in respect of the houses or other buildings within the said parishes, any or either of which should be so quitted as aforesaid, (according to the last assessment thereof to the 25th March last,) or annual sums of money equal to the loss in tithes, or sums of money or customary payments in lieu of tithes, which the said rectors and impropriators, their respective successors, heirs, or assigns, might sustain by the want of occupiers, in or by the taking down of such houses or other buildings respectively estimated as aforesaid, should be paid and payable to the said several rectors and impropriators, their respective successors, heirs, and assigns, out of the said moneys to be applied for the purposes of this or the said first-recited act, clear of all taxes and deductions, at the four most usual feasts or days of payment in every year; that is to say, the 25th March, the 24th June, the 29th September, and the 25th December, by equal payments in each year, the first payment thereof respectively to be made on such of the said feast-days as should first and next happen after the occupier or occupiers of any such houses or other buildings in the said parishes, any or either of them, should have quitted the same as aforesaid; and such sum and sums of money to be paid and made good as aforesaid should diminish in proportion to the tithes, or yearly sums of money by way or in lieu of tithes, which should for the time being be actually payable for new houses or other buildings erected, completed, and occupied on ground which should be so cleared within the said parishes, any or either of them, as aforesaid; and in case such sum or sums of money to be paid and made good as aforesaid should not be paid within twenty-one days after the same respectively should become due, then and in such case the same should and might be recovered, by the order of any two justices of the city of London, in like manner as any damages or charges, the manner of ascertaining or recovering the amount whereof is not by the said first-recited act specifically

The London and Blackwall Railway Company v. The Rev. John Letts.

provided for." The bill then stated, that, for the purposes of such acts, thirty-three houses in the parish of St. Olave had been taken by the company, and that 2,978*l.* was the aggregate annual sum at which those houses had been assessed for the relief of the poor: that the assessment for the poor-rate was the only public and general assessment made of the annual value of the houses, &c., in the city of London, and that it regulated all other rates: [the bill then set out the value of the premises taken by the company, according to the poor-rate assessment:] that the value of the said premises, as assessed by agreement between the rector and the occupier, exceeded the poor-rate assessment, but the plaintiff in his claims adopted the poor-rate assessment. The bill then stated, that the occupiers had quitted the houses so taken, and that part thereof were still left standing, while others had been pulled down, and new buildings erected in their place. The bill prayed that the plaintiff and his successors might be declared entitled to tithes after the rate of 2*s.* 9*d.* in the pound on the annual value of the premises taken by the railway company, according to the last assessment made thereof respectively, up to the 25th March, 1839, by agreement between the rector and occupier, or else according to the last assessment to the poor-rate, subject to deduction in respect of houses or parts of houses left standing, and in respect of new houses which should thereafter be erected and occupied on the ground cleared by the railway company; and it also prayed a reference as to the amount of tithes to which the plaintiff was entitled under the declaration, and directions for payment; and in case it should appear that warehouses, &c., constructed by the railway company on the ground cleared away by them were to be considered as tithable premises, and that the compensation for the loss of tithes had wholly or in part determined, then the bill prayed a declaration, that, in addition to such part of the compensation, if any, as had not determined, the plaintiff was entitled to tithes after the rate of 2*s.* 9*d.* in the pound on the annual value of such warehouses, &c.; and also a reference as to the value, and direction for payment. The defendant filed a cross bill against the plaintiff in the first suit for the purpose of discovery, and praying a declaration that the defendant, the rector, was only entitled to demand tithes after such rate, and upon such value of the several premises, as might have been agreed upon by the rectors of St. Olave's and the defendant in particular, or after such rate and upon such value as the several premises might, in the terms of the act 2 & 3 Vict. c. 95, have been assessed to the 25th March, 1839, or of such annual sum as might be equal to the aggregate loss in tithes, or customary payments in lieu of tithes, in respect of the premises, which the defendant might have sustained by the want of occupiers of, or by the taking down, the said premises; such payments always diminishing in proportion to the tithes which should be payable in respect of new houses erected by the plaintiffs. The respondent, by his answer to the appellants' cross bill, admitted, that in respect of all the premises which had been taken by the appellants, with the exception of two houses, one occupied by his own collector, and the other by her majesty's Commis-

sioners of Excise, annual payments in lieu of tithes had been taken by the rector of the parish at a rate, in each instance, below 2s. 9d. in the pound; and that previously to the respondent's induction, the annual value of the tithable premises in the parish had been from time to time assessed by agreement between the rectors and the several occupiers. And the respondent, by his answer, further admitted, that, upon his becoming rector of St. Olave's, Hart street, he received from the family of his predecessor a book containing, or purporting to contain, an account of the tithes actually received by Dr. Owen, his predecessor, from the occupiers of the parish, from Christmas, 1834, to Michaelmas, 1837, but he alleged that it did not show after what rate, or upon what annual value, or in what manner such tithes were computed; but from the information received by him from other sources respecting the annual value of the said premises, and respecting the character and habits of Dr. Owen, he believed that such tithes were computed at a rate considerably lower than 2s. 9d. in the pound. And he further admitted, that upon his induction as rector, he collected from each occupier the same tithe which had been paid to Dr. Owen, until any change of occupation took place, and upon every such change he caused a new assessment to be made of the annual value of the premises so newly occupied, by agreement between himself and the new occupier, and the assessment for the poor-rate was the ground for such new assessment, but no agreement was entered into between them as to the rate or amount of tithe to be paid on such annual value, but that he instructed his collector to collect tithes after the rate of 2s. in the pound on each of the premises so newly assessed; and in a schedule to his answer the respondent specified the particular premises taken by the appellants in respect of which such new assessment had been made by him; but he alleged that, as to these last-mentioned premises, for the period before such new assessment, and as to the other premises taken by the appellants, and not comprised in the said schedule, he did not know at what rate in each instance, or any instance, annual payments by way of tithe had from time to time been taken by several rectors of the parish, or by himself in particular; and he denied that the premises taken by the appellants, or any of them, were assessed to the 25th March, 1839, at any rate, as to each of them, below 2s. 9d. in the pound of the annual value thereof; but he admitted, that, under the circumstances stated in his answer, the annual value of the premises situate within the parish, and in particular those taken by the appellants, had from time to time been the subject of special agreement between the rector and the owners and occupiers of the said premises. The respondent, by his answer, further said, that as to all the premises, with the two exceptions before referred to, he did, under the circumstances mentioned in his answer, demand and receive considerably less than 2s. in the pound on the annual values thereof, for he continued to receive the tithes which had been received by his predecessors, which he believed to have been computed after a rate of 1s., or, in some instances, even 6d. in the pound, although he was unable to ascertain the precise rate, for the reasons he had before given.

The London and Blackwall Railway Company v. The Rev. John Letts.

On the 9th February, 1847, the causes were heard before Wigram, V. C., when his honor declared the respondent entitled, subject to the deductions after mentioned, to be paid tithes after the rate of 2s. 9d. in the pound on the annual values of houses and other buildings taken by the appellants, as such annual values had been agreed on between the rector for the time being of the parish of St. Olave, Hart street, and the respective occupiers for the time last before Lady-day, 1839; and ordered that it should be referred to the Master of the Court, in rotation, to inquire and state to the court what houses and other buildings had been taken by the appellants, and the annual values thereof respectively, according to such last agreement aforesaid; and in case, as to any of the said houses and other buildings, no such agreement as aforesaid should be proved to have been entered into, then, as to each of such last-mentioned houses and buildings, it was ordered that the master should take the annual sum last collected by way of tithe thereon, as representing 2s. 9d. in the pound on the annual value thereof; and it was ordered that the master should take an account of what was due to the respondent from the appellants for tithes, having regard to the declarations and inquiries aforesaid; and it was ordered that the master should also take an account of all sums received by the respondent from the appellants, or any other person, for tithes, in respect of any and which of the houses and buildings so taken as aforesaid since they were so taken, or in respect of any and what new houses or other buildings erected by the appellants on the site thereof; and it was ordered that the master should deduct the amount of the sums so received from what he should find due for tithes, and state the balance; and it was ordered that the appellants should pay such balance to the respondent, with liberty to apply. The inquiry proceeded in the Master's office, and the Master made a report, to which certain exceptions were taken by the appellants, and an order made thereon; but it is unnecessary to state the particulars of these exceptions, or the order, as the whole question on the appeal turned upon the decree of February, 1847. The appeal was from that decree, and the order upon exceptions.

The Solicitor-General (Sir W. P. Wood,¹) and Bigg, for the appellants, contended, that the true construction of the act, giving indemnity to the rector, was, that he was to receive from the company, in respect of the houses, &c. taken by them, the amount actually accepted and received by him from the occupiers, as and for payment of such tithes, up to the 25th March, 1839; that the construction put upon the words, "according to the last assessment thereof to the 25th March last," by the Vice-Chancellor, was both shifting and contradictory, and would have the effect of giving to the rector more than an indemnification for his actual loss: that that part of the decree directing the amount *received* by the rector in respect of tithes of

¹ Mr. Page Wood was not Solicitor-General at the time this case was argued, but before judgment was delivered he had been promoted to that office.

The London and Blackwall Railway Company v. The Rev. John Letts.

new houses erected by the company was wrong, as it left it in the power of the rector to agree with the occupiers for less than the real value: and that the decree ought to have directed the master to deduct the amount actually *payable* in respect of such new houses from the amount he should find due from the company.

The Attorney-General (Sir John Romilly), and Speed, for the respondent, contended, that at the time of the passing of the railway company's act the rector had an absolute right, under the decree of 1545, to receive 2s. 9d. in the pound on the rent or the annual value of the houses; and that although the rector had from time to time received from the occupiers less than the full amount of the tithes payable to him, yet that this abatement was purely voluntary on his part, and not binding between him and the occupiers: that the company were bound to pay the rector 2s. 9d. in the pound in respect of premises taken according to the last assessment of the *annual values* thereof prior to the 25th March, 1839: that the words "according to the last assessment thereof" must refer to the annual value of the premises as assessed or agreed upon between the rector for the time being and the occupiers, and not to the *rate of tithes* payable on the annual value, when such annual value should be ascertained, for that the *rate of tithes* had been settled, by the decree of 1545, at 2s. 9d. in the pound, and had never been the subject of agreement between the rector and the occupiers: that the rule of construction applied to statutes of this description was, that it must be construed strictly against the company. *Blakemore v. The Glamorganshire Canal Company*, 1 My. & K. 154; *Parker v. The Great Western Railway Company*, 3 Railw. Cas. 563; *Barrett v. The Stockton and Darlington Railway Company*, 2 Railw. Cas. 443. That it could not have been intended that the company was to benefit by the kindly feeling of the rector, which induced him to take 2s. in the pound from the occupiers: that if the decree of the Vice-Chancellor, directing the amounts *received* by the rector in respect of new houses erected by the company to be deducted from the sum due from the company, be not correct, then the rector must sacrifice all his kindly feelings, and exact the 2s. 9d., or lose the difference between that sum and the 2s. which he was in the habit of taking.

The Solicitor-General, in reply.

Vivian v. Cockrane, 4 Hare, 167; 9 Jur. 8; *Antrobus v. The East India Company*, 13 Ves. 9, and other cases referred to in *Vivian v. Cockrane*, were cited in the argument.

August 8. The LORD CHANCELLOR, in moving the judgment of the House, said: This case, my Lords, is before the House by way of appeal against a decree pronounced by the late Vice-Chancellor Sir James Wigram, in a cause in which the Rev. John Letts, the rector of the parish of St. Olave, Hart street, City, was the plaintiff, and the Blackwall Railway Company the defendants. The plaintiff by this suit seeks to obtain a decree for the payment of a sum of

The London and Blackwall Railway Company v. The Rev. John Letta.

money, compensation in lieu of tithes, under the provisions of Stat. 2 & 3 Vict. c. 95, and intituled "An Act for extending the Line of Railway between London and Blackwall, called 'The Commercial Railway;' and for amending the Acts relating thereto." By that statute a company, which had been incorporated by the 7 Will. 4, c. 118, was authorized to construct a railway from certain parts of the city of London to Blackwall. In the 62nd section of the Stat. 2 & 3 Vict. c. 95, a provision was contained for indemnifying the clergy in the parishes in the city of London, through which the intended railway was proposed to pass, for the loss of the money payments, in lieu of tithes, which they would sustain by the removal of buildings by the railway company. Two questions arose for decision in the suit: the one, whether the rector was entitled to a decree for the payment of 2s. 9d. in the pound upon the annual value or rent of the premises which the company had removed under the authority of the Railway Act, during the period the ground remained vacant, and therefore not liable to assessment in respect of tithes; or whether the rector's right during the period before mentioned was limited to a payment according to the rate which had been paid for the quarter ending at Lady-day, 1839, by the occupiers of the premises which had been removed. Secondly, whether the liability of the company, in respect of the premises which had been removed, was continued until any newly-erected or substituted premises should become productive to the rector, or only during the time the ground from which the premises had been removed, and the newly-substituted premises, should not be liable to assessment. Upon the first point, the decree of the Vice-Chancellor, in all cases where there had been no agreement between the rector and the occupier relative to the rate to be imposed, or to the rent or value of the premises, subjected the company to a liability after the same rate as the occupiers of the removed premises had paid during the quarter ending Lady-day, 1839; but where the payment up to Lady-day, 1839, had been regulated by agreement between the rector and the occupier, the decree directed that the company should be charged by a rate of 2s. 9d. in the pound upon the actual value or rent of the premises. Upon the second point, the decree directed the company to be charged after the rate before mentioned, subject to a credit or deduction of so much money as the rector should actually have received in respect of any newly-erected premises. Against this decree the company appealed; and the questions to be decided by your Lordships depend upon the construction of the 62nd section of Stat. 2 & 3 Vict. c. 95. Among the parishes through which the defendants were authorized to construct their railway was the parish of St. Olave, Hart street, and for that purpose they were authorized to remove such buildings as should be necessary. The removal of those buildings would necessarily diminish the income of the rectors of the several parishes, and therefore the 62nd section of the statute was enacted to indemnify them in respect of such diminution. [His Lordship here read that section, and proceeded.] Before submitting to your Lordships what seems to me to be the correct construction of that section, it may be convenient that I should

The London and Blackwall Railway Company v. The Rev. John Letts.

state the facts to which that construction is to be applied. Your Lordships are aware, that in the city of London, in lieu of tithes, the incumbents of the several parishes, by virtue of a decree made under the authority of an act of parliament, are entitled to a money payment, after the rate of 2s. 9d. in the pound, upon the houses and buildings within their respective parishes. The decree is dated the 24th February, 1545, in the thirty-seventh year of the reign of King Henry VIII. In the course of various judicial proceedings it has appeared that the decree was very partially acted upon until within a recent period. The payments up to that time were made according to agreement between the occupiers and incumbents of their respective parishes, fluctuating between 6d. and 1s. in the pound upon stipulated amounts. Your Lordships may also, perhaps, be aware that no questions come before courts of justice upon which such uncertain and contradictory evidence is given as upon the value of houses in the city of London. When the proposed indemnity was to be provided for, it was therefore to be expected that the parties interested would be desirous of adopting some rule or test by which a proper amount of indemnity could be ascertained or regulated, without resorting to any disputable and possibly litigious course of ascertaining, in each instance, upon what amount and after what rule the compensation would be assessed. In the parish of St. Olave, Hart street, the money payments in lieu of tithes during the incumbency of the former rector had been regulated by agreement. The present rector continued to collect after the same rate as his predecessor had done, until a change took place in the occupation, and upon such a change he came to an agreement with the new occupier as to the amount upon which the assessment should be made, and then took 2s. in the pound upon the agreed sum, except where the occupation was by a public company, and of such companies he claimed the full 2s. 9d. upon the agreed rent. In considering what is the correct construction of the section in question, the object of the enactment should be borne in mind, and that object was to give indemnity, and indemnity only, to the incumbents of the different parishes; and that purpose would be accomplished by the company paying to the clergy just so much as the clergy would have received if the railway company had never interfered with the premises, which they, in fact, did remove. It may also be observed, from the class of buildings in the part of the parish through which the railway was proposed to pass, that any new buildings which should be erected by the company would be of a superior description, and of a much higher annual value than the buildings which were to be removed, and the permanent effect of the execution of the company's works would be materially to increase the income of the clergyman. It was, however, certain, that after the then existing buildings should be removed, there would be an interval during which there would be an interruption in or suspension of such income. There can be no doubt that the section in question was intended to embody and express an agreement come to amongst the parties, and sanctioned by parliament and the bishops; and the substance of that agreement seems to be, that, after the occupier of the premises to be

The London and Blackwall Railway Company v. The Rev. John Letts.

removed should have quitted possession, the yearly sums of money in lieu of tithes payable in respect of such premises, according to the last assessment thereof to the 25th March, 1839, equal to the loss which the clergy might sustain by the want of the occupiers, estimated as aforesaid, should be paid to the clergy by the company at the times therein mentioned. The language thus used *prima facie* imports that the sums for which the clergy were entitled to be indemnified were those sums which, according to the assessment to the 25th March, 1839, (the last quarter of the previous tithe year,) would have been receivable by them during the interval of the removal of the old buildings and the construction of the new buildings, which would be liable to tithes. Plain, however, as these words appear to be, the whole dispute is as to their meaning. It occurs to me that proof that certain sums had been demanded by the clergy, and paid by the occupiers, would within the meaning of the act have conclusively proved what had been the assessment of the occupiers so paying to the 25th March, 1839; and upon these facts there does not appear to have been any dispute or uncertainty, but the question raised is, what was meant by the word "assessment" in the sentence which expresses that yearly sums of money, payable according to the last assessment thereof to the 25th March, 1839, equal to the loss which the clergy might sustain by the want of occupiers of the buildings taken down, estimated as aforesaid, should be paid by the company. The respondent, the rector, has claimed to be entitled to be paid 2s. 9d. in the pound upon the alleged annual value of all the premises removed by the company, during the period of the ground being unoccupied. The company, on the other hand, contend that they are liable only to pay such sums as the occupiers of the premises removed would have paid during the interval referred to, according to the assessment of the 25th March, 1839, if their occupation had not ceased. The decree appealed against decided, as I have before stated, that in all cases where it could be proved that the amount of rent had been agreed upon, the rector was entitled to receive 2s. 9d. in the pound assessed upon such agreed rent or value, but that in respect of other premises, where no agreement could be proved as to the rent or value, the company were liable to pay only after the rate which had been paid to the 25th March, 1839. I cannot advise your Lordships to adopt that conclusion. The Vice-Chancellor held, that the word "assessment" did not refer to the assessment for the poor-rate; in which, I think, he was clearly right. The amount of rent attached to any premises liable to be rated to the poor did not constitute the assessment, but the sum charged in respect of such amount or value constituted the assessment, and that assessment, it is quite clear, could not form the basis of compensation for loss of tithes. The learned judge's course of reasoning appears to have been, that where a sum was paid in respect of tithes to the 25th March, 1839, without proof of any prior agreement, the amount so paid ought to be taken as the assessment referred to in the act of parliament, although that sum was less than 2s. 9d. in the pound upon the admitted amount of the rent or value; but where there had been any agreement as to the amount of rent or

The London and Blackwall Railway Company v. The Rev. John Letts.

value, and the rector had taken 2s. in the pound upon that amount, he (the Vice-Chancellor) should not hold payment after such rate to be proof of an assessment, but should hold the receipt of 2s. in the pound by the rector, instead of 2s. 9d., to be merely a voluntary remission or reduction, and that the amount of the rent being agreed, the law made the assessment at 2s. 9d. The reasoning for this conclusion seems to me vague and unsatisfactory, and the conclusion wrong. The parties must have acted upon the assumption, when the act passed in the summer of 1839, that there had in fact been some arrangement throughout the parish, by which the amount of tithes to be paid to the 25th March preceding, had been understood, agreed, and settled, and such arrangement, by consent, was denominated an assessment; and as it would be proved by actual payment, it constituted a definite and certain test, excluding the necessity of inquiring as to the value of the premises, the amount agreed to be received, or any other fact than the actual payment and receipt. But, according to the argument of the respondent, when the act passed he agreed to be compensated by an assessment to the 25th March, 1839, when he knew no such assessment had been made. The company could not object to being bound to pay compensation for loss arising from the removal of occupiers, after the rate which those occupiers had actually paid during their occupation; but if the rector had insisted that that was not a just rate of compensation, because those payments had been reduced, by indulgence and consent, below what he was entitled by law to receive, I have no doubt that some distinct enactment would have been adopted to preclude the possibility of dispute as to the rent or value of every house in the parish. The fact was apparent, that the rector had, to the 25th March, 1839, never received 2s. 9d. in the pound from any of the occupiers, except corporations and public companies, and there was reason to believe that he would have received after that rate during the period for which compensation was to be made, if the occupation had remained undisturbed by the company; and as I infer, from the terms of the statute, that it was the object of the legislature to give *indemnity* to the clergy, and no more, a construction of the section which would subject the company to the payment of a greater amount than the rector would have received if the company had never existed does not appear to me to be consistent with that purpose. In order to carry the intention into effect, the measure of indemnity refers to a test which seems well adapted to the purpose, that test being the rate and computation which had been adopted by the rector and the tithe-payer previous to the establishment of the company, and which there was no reason to suppose would have varied during the interval for which compensation would have to be computed. The act has denominated that test and computation the "assessment," and the question is, whether any thing existed to which the word "assessment" can be properly referred. I think there did, and that the amount claimed by the rector, and paid by the occupiers to the 25th March, 1839, constituted the assessment intended by the act. Compensation, according to that test, would I think, not only be a just rule, but the only just rule, and was at the

The London and Blackwall Railway Company v. The Rev. John Letts.

same time the best calculated to accomplish that object which all the parties, when before parliament, would propose to desire, viz., to exclude uncertainty and litigation; and for these reasons the decree, I think, is not warranted by the statute, and gives to the rector more than indemnity, as it gives 2s. 9d. in the pound, when, if the company had not existed, it is clear the rector would only have received 2s. in the pound; and it gives 2s. 9d. in the pound upon amounts larger than the rate would have been calculated upon if the occupation had continued undisturbed. Having come to the conclusion that the learned Vice-Chancellor has not put a correct construction upon the section in question, I recommend your Lordships to reverse the decree founded upon such erroneous construction, and that the cause be remitted, with a direction in conformity with the construction of the statute which I have presumed to submit to the House. The decree appears to be erroneous also in this respect. The company was to continue liable to indemnify the rector in respect of the buildings removed by them until other buildings upon the same site should be constructed and become liable for tithe rent, when the liability of the company was to cease in proportion to the sums which would become payable to the rector by the construction of such new buildings. The decree directs the amount payable by the company to be credited only with the sums actually received by the rector in respect of such newly constructed buildings, and does not direct, as it ought to have done, that the company should be credited with the sums which have become payable in respect of such premises. I think the decree should be reversed in this respect; and while the company should be charged for the interval during which compensation is payable, according to the payments by the respective occupiers, to the 25th March, 1839, credit should be allowed to the company for such tithe rent as should have become payable in respect of the new buildings.

A discussion then took place in reference to the costs which had been incurred in the master's office subsequently to the decree of February, 1847,

Speed contending that the appellants ought to bear those costs, they having been incurred in consequence of the appellants having so long delayed their appeal, which they did not present until 1849.

The Solicitor-General proposed that no order should be made as to these costs, but that, in remitting the case to the court below, it should be made a part of the decree to direct that these costs should be reserved, which would have the effect of leaving it within the discretion of the court.

The House was of this opinion.

Decree reversed; cause remitted accordingly.

The Earl of Glasgow v. The Hurlet and Campsie Alum Co.

THE EARL OF GLASGOW and JOHN WILSON & SONS, Appellants, v.
THE HURLET AND CAMPSIE ALUM COMPANY, and JOHN KING, Re-
spondents.¹

June 25, 26; July 2, 1850.

Bill of Exceptions — Mines.

A bill of exceptions was tendered to a judge's direction, and under the 55 Geo. 3, c. 42, s. 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the court:—

Held, that the introduction of this explanation was highly irregular: but that, being on the record, the court below, and this house, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed.

A lease of alum mines gave the lessee the right to obtain alum from certain coal-wastes. A subsequent lease of the coal-mines provided that nothing thereby granted shall injure the rights of the parties who held the alum-mines. The alum existed in the coal-wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—

Held, that the coal-pillars could not be removed.

THIS was an appeal against an interlocutor of the Court of Session, pronounced in a conjoined action of suspension and interdict, and of declarator, arising out of the following circumstances.

The Earl of Glasgow was the owner of certain land at Hurlet, which was in many respects very valuable for mining purposes. It contained mineral strata of various descriptions. Nearest the surface of the earth was a stratum of limestone rock, about three feet thick, below which was a bed of alum ore, or schistus, of about the same thickness, and below the alum was a seam of coal, of nearly double that extent.

The respondent King, and the company now interested with him, obtained, in the year 1800, a grant of the alum ore for a period of sixty-two years, and the question between the parties related to the manner of working the mines respectively belonging to them. All these mines had been previously worked, and there had been a contract for obtaining all the copperas stones from the coal-pits and the coal-wastes. Alum, however, having become more valuable, and that which came from these mines being of the best sort, this contract of 1800 was made between the persons composing the Alum Company and the Earl of Glasgow, by which he "does hereby assign, sell, and convey to, &c., their heirs and assigns, the whole ore in his said coal-pits and coal-wastes at Hurlet, from which alum can be manufactured, excepting the pyrites or copperas stones, which are already conveyed to the partners of the Hurlet Company, to work and collect the said ore in all the old coal-pits and coal-wastes at Hurlet; to open up old pits where the same may happen to be now shut; to erect gins or other machinery for draining the said ore to the surface,

¹ 3 House of Lords Cases, 25.

The Earl of Glasgow v. The Hurlet and Campsie Alum Co.

and to make roads and passages for conveying the same from the pits to the adjacent public roads; but reserving to the said Earl, his heirs, &c., and the tacksmen of his coal-works, lime-works, iron stone, and other metals, the exclusive use, at all times, of five pits, to be from time to time made choice of for the purpose of working coal, lime, iron stone, and other minerals; and declaring that while these five pits are thus appropriated, the said (grantees of the alum) shall have no right of access thereto, for collecting or cutting out alum therefrom, but in the event of the said Earl, or his foresaids, purposing to work limestone in any of the pits after the coal has been wrought out, and from which the alum ore has not been taken away, he and they shall be bound to give the said (grantees of the alum) two months' previous intimation of such intention to work limestone, or, in case of failure, to give such intimation, that they shall shovel the ore aside at their own charges, so as the same may not be wasted. Further the said Earl agrees, that, in the event that he or his foresaids should cease to work the coal and limestone, and should desist from drawing the water out of the waste, the machinery which has been employed for drawing the water shall be sold and delivered over to (the grantees of the alum) at valuation, &c., who shall afterwards have liberty to draw the water from the coal-waste during the remainder of his contract. And the Earl binds himself and his foresaids not to fill up any of the pits now open, or hereafter to be opened, for working coal or lime at Hurlet, the (grantees of the alum) hereby becoming bound to fence in a sufficient manner all such pits as shall be left by the Earl or his foresaids within two weeks after being given up. And he likewise grants to them and their foresaids, during the said period, the liberty and privilege of returning the washed ore from their alum-works, and depositing the same in any of the coal-pits at Hurlet, where the limestone has been previously wrought out. For which causes the said (grantees of the alum) bind themselves to pay to the Earl, his heirs, &c., a clear lordship of one shilling and sixpence sterling per ton for the whole alum ore to be taken by them from the said pits, free of all charges, &c." For twenty years the works went on at a great profit, both alum and copperas being procured from the ore; but chemical discovery rendered the alum less valuable, and, from time to time, the grantees allowed their works to remain idle.

Wilson & Sons became, in 1835, the lessees of the coal and limestone mines for a term of years ending in 1852. In the lease of the coal-mines, giving them the right fully to work the coal, there was, among others, the following exception: "It is hereby declared that nothing herein contained shall in any way injure the rights of the parties who lease the alum and copperas ores from the said Earl of Glasgow."

The established mode of working the coal-mines up to 1843 had been by what was called *stoop* and *room*; the stoop being the pillar which was left for the support of the roof, and the room being the space left between the pillars upon excavating the coal. The *room* was also called the *waste*, and the fall of the roof which produced

what was called the extinction of the waste, was known by the name of a *crush*. When it once commenced it often extended far beyond the immediate neighborhood of the pillars actually removed, the lateral pressure destroying the roof for a considerable distance. A crush was always liable to be occasioned by the removal of the coal-pillars, and as it rendered the obtaining of the alum impossible, the right of the lessees of the coal to work (that is to say, to remove) the coal-pillars, was the question raised in this case.

In 1843 the lessees of the coal began to remove the coal-pillars, and a crush of a very extensive nature followed. Some arrangement was for a time made between the parties, but, in November, 1846, the grantees of the alum presented a note of suspension and interdict, praying that the lessees of the coal might be prevented "from cutting out and removing, or weakening and injuring any of the pillars in the coal-pits and coal-wastes, whereby the same, or any of them, might be shut up, or the access thereto endangered during the remainder of the lease of the alum ore." In answer to the prayer of this suit, the Earl and the lessees of the coal-mine insisted that, by the grant of 1800, he was "under no necessity to refrain from working the coal-pillars as well as the other coal on the lands of Hurler, when circumstances should render this necessary, or when he should think proper to do so."

While the case was under discussion, but after an interdict granted, Messrs. Wilson, the lessees of the coal, offered to collect and bring to the mouth of the mine the whole alum ore, either taken from the top of the coal-pillars, or found in the wastes, and to allow King and the company to take it away, on payment of one shilling and sixpence a ton, within six months from the time of intimation of its having been brought to the pit's mouth being given to them; in consequence of which offer the Lord Ordinary recalled the absolute interdict he had previously granted, but allowed the suspension prayed for, the effect of which was to permit the coal lessees to continue work, subject to responsibility in damages.

King and the Alum Company then brought an action of declarator against Wilson and Sons, in order to have the extent of their relative rights ascertained and declared, and the amount of damages assessed, and the Lord Ordinary settled three issues for trial, of which the first alone now requires to be considered: "Whether the defenders, or any of them, have removed, or are in the course of removing, or unduly diminishing, wrongfully, and in violation of the rights of the pursuers, under the said contract or lease [of 1800] coal-pillars in the pits or wastes under the lands or farms comprehended in the said contract, to the loss, injury, and damage of the pursuers."

The cause came on for trial before Lord Ivory, as Lord Ordinary, on the 3d of April, 1849. It lasted eight days, and, at its conclusion, his lordship stated his construction of the lease to be in favor of the pursuers, and directed the jury accordingly. The counsel for the defenders took two exceptions to this direction: first, "In so far as his lordship directed the jury in point of law that, according to the sound legal construction of the contract, it gives the pursuers the

The Earl of Glasgow v. The Hurlet and Campsie Alum Co.

right, throughout its endurance, to prevent the landlord, or his tenant in the coal, from removing the pillars in so far as necessary to support the roof, though all the solid coal should be wrought out; secondly, In so far as his lordship declined, when requested by the defenders, to direct the jury in point of law that there is nothing in the contract of 1800, or in the leases of the coal of the defenders, to bar the Earl of Glasgow, or any person deriving right from him, to work out the pillar coal in a fair and regular manner after the solid coal is exhausted."

The bill of exceptions was first prepared with the exceptions as stated above, and in that state was signed by the judge. The jury returned a verdict for the Alum Company, with 5000*l.* damages. The bill of exceptions afterwards became the subject of discussion between the parties, and the judge refused finally to sign it, unless the following paragraph (here marked between brackets) was introduced as explanatory of his direction: "In charging the jury, the Lord Ordinary stated as the legal construction of the lease of 1800, that the said contract or lease gave right to the tenant throughout its endurance [and so long as there should exist in the pits or wastes comprehended in the contract, alum ore unexhausted and workable, being part of the subject thereby conveyed or let] to prevent the landlord, and all deriving right through him, from removing the coal-pillars in the said pits or wastes, in so far as these were necessary to support the roof of said pits or wastes, and thereby to preserve the requisite access for working the said alum ore; and that it mattered not, as regards this question of construction, and the rights of the tenants of the alum ore in respect of the same, whether the solid coal in the said pits or wastes should or should not have been previously wrought out."

The defenders at once objected to this addition, but his lordship persisted in requiring it, and they finally gave way, on which the bill of exceptions was signed, the following words being added, at its conclusion: "Whereupon the said counsel, learned in the law, for the said defenders, did then and there propose the aforesaid exceptions to the directions of the said Lord Ivory, and did request him to sign this bill of exceptions, according to the form of the statute in such case made and provided: and thereupon the said Lord Ivory, at the request of the said counsel for the defenders, did sign the said bill of exceptions, pursuant to the said statute, on the 29th day of November, 1849, and in the fourteenth year of her present Majesty's reign. J. Ivory."

When the case came on to be heard before the Inner House on this bill of exceptions, which had been duly presented by the judge to the court, the defenders set forth by affidavit the circumstances attending the preparation of the bill of exceptions and contended that the exceptions alone ought to be taken into consideration, as being alone the original bill of exceptions properly prepared under the statute,¹ and that the court ought not to pay any attention to the state-

¹ The 55 Geo. 3, c. 42, s. 7, (Scotch act,) by which it is enacted that "it shall be

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

ment explanatory of the direction introduced by the Lord Ordinary, for that the note tendered to the judge at the trial, and then signed by him, was the only document which could be referred to. The court, however, refused to refer to the affidavit, or to listen to any statement of fact, or to look at any thing but the bill of exceptions as presented by the judge to the court, and, on the questions being raised, gave judgment supporting his direction. On both these grounds the appeal was now presented to this house. Counsel were, in the first instance, directed to argue the question whether the bill of exceptions as finally presented to the court, or the paper signed by the judge at the time of the trial, was that on which the court ought to have proceeded.

Sir F. Kelly and *Mr. Inglis* for the appellants (defenders in the court below.)

The court was wrong in looking at any document as the bill of exceptions except that which was actually tendered and signed at the trial. The statement of counsel, fortified by affidavit, ought to have satisfied the court that there had been some mistake, and that the bill of exceptions, tacked to the record, was not that which was the genuine one, and the court ought to have removed that paper and replaced it by the other. The 55 Geo. 3, c. 42, established in Scotland the power to tender bills of exceptions, according to the form so long prevalent in England; and the Act of Sederunt of the Scotch courts, of the 16th February, 1841, adopting that as the rule, directs the counsel tendering an exception, to deliver a note of it to the judge at the time the exception is taken, and say, "that it is to be certified by the judge at that time, and that it is to be settled and certified, as aforesaid, before the jury is inclosed to consider the verdict. Strictly speaking, therefore, nothing but that which is signed at the trial constitutes the bill of exceptions, and though, for convenience sake, parties are often permitted, as in this country, to make up the formal draft of the bill of exceptions within a few days after the trial, yet fresh matter is never allowed to be introduced into it. The Scotch courts have hitherto acted on this rule, and have refused leave to amend or alter a signed bill of exceptions, even for the purpose of making it in conformity with the notes taken by the judge at the trial. *Pollok v. Morris*, 7 Cas. in the Court of Session, 973.

All the English authorities are to the same effect, and though the practice of the Scotch courts cannot be governed by them, still, as

competent to the counsel for any party, at the trial of any issue, to except to the opinion and direction of the judge before whom the same shall be tried, as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial; and that on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the judge; but, notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and shall assess damages where necessary: and after the trial of every such issue, the judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue, and a copy of the verdict of the jury indorsed thereon, to the division by which the said issue was directed, which division shall thereupon order the said exception to be heard in presence on or before the fourth sederunt day thereafter."

The Earl of Glasgow v. The Harlet and Campsie Alum Co.

the Scotch bill of exceptions was introduced in imitation of the law and practice existing in England, they are important for the purpose of illustration. Here, according to the statute, the counsel tendering the bill of exceptions made a note of the exceptions, and required the judge to sign it. To sign what? The paper then tendered;—not the paper or parchment presented to the court eight months afterwards;—and he did sign the paper which was then tendered to him, and having done so, his authority in the matter was at an end. The judge had no power to meddle with the exceptions after he had once signed the note at the trial. Any proceeding of his, after he had once employed and exhausted his power, was void. For a similar reason, in *Holt v. Meadowcroft*, 4 M. & S. 467, a trial before a common jury was set aside; because, when there were no special jurors who answered to their names, the judge, in spite of the defendants' objection, tried the case by a common jury. The fact that the defenders here accepted the bill of exceptions, thus altered, does not affect the case, for there the defendant had, under the pressure of necessity, taken part in the trial; but the court held that his doing so did not get rid of the error in the proceedings. In *Lycett v. Tenant*, 4 Bing. N. C. 168, the Court of Common Pleas adopted the same principle, and, because the date of the writ of summons which had not been inserted in the issue delivered to the defendant, was inserted by the plaintiff in the writ of trial, that writ was set aside, notwithstanding the defendant had appeared at the trial, for as he appeared under protest, he was held not to have waived the irregularity.

Mr. Bethell and *Mr. Cockburn*, for the respondents. The decision of the court below on this point was correct. That court could not look at any thing but the document presented by the judge as the bill of exceptions, and this house cannot look at any thing but the record. The party cannot be allowed to allege any thing against the record. Bull. Ni. Pri. 315. The real question is, What constitutes the bill of exceptions? and the answer is, that that which was presented to the court by the judge is the only document which authoritatively bears that character. It is not the bare act of sealing the bill of exceptions here, or of signing it in Scotland, that makes it binding past recall or change. It may be admitted that, strictly speaking, the bill of exceptions should be completed before the jury has delivered the verdict; but, in practice, every one knows that that strictness is not enforced; for to enforce it would, in many cases, lead to injustice. If, as originally prepared, the parties know that in the hurry of a *Nisi Prius* trial errors have crept into it, those errors may be amended, and the instrument finally presented to the court by the judge becomes the veritable and authentic instrument. Besides, the object of the appellants here is to exclude a material qualification of law, as stated by the judge to the jury, and the very object of a bill of exceptions is to bring before the court above, the law exactly as explained by the judge to the jury. The Scotch authorities themselves show this. In *Adam on Trials by Jury in Civil Causes*, 314, 315, it is said, that "a bill of exceptions must be to some point of law; and this must

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

always be kept in mind, for, if it deviates into matter of fact, such deviation renders it destructive of the object for which it is instituted, namely, to ascertain the correctness of the law laid down by the judge at the trial. A bill of exceptions may also be tendered to the judge's refusal to adopt a direction in point of law. Counsel may require a judge to give a particular direction upon the law, and if he declines, a bill of exception may be tendered. Such bill must contain a statement of the point of law for which counsel contends, and the judge's refusal to direct as required, gives the party the right to except." And again the same very learned writer observes, *Ibid.* 316: "Bills of exception, if not introduced, were regulated in point of form in England by the ancient Statute of Westminster 2, (13 Edw. I. c. 31.) Like new trial, bill of exception is purely of English origin, so that every thing which relates to its form, application, and efficacy is to be learned by reference to the proceedings upon it in the supreme courts of England. The Court of Session, therefore, must be guided by the practice of England in all that relates to the frame and use of bills of exception; the sole and proper office of which, as has been said, is to correct the errors of the judge who presides at the trial of civil causes, on the admissibility of evidence, or on the directions in matter of law given in the course of the trial."

It is, therefore, of the utmost importance that every part of the charge should be set out in a bill of exceptions, so far as it is necessary truly to show the part which is the subject of the exception. *Duff v. White*, 2 Wils. & Shaw, 204. To state a proposition of law, without giving the qualification which accompanied it at the moment of its enunciation, would be to misrepresent the direction, and not only to do an injustice to the learned judge, but to the party whose rights and interests might be thereby seriously affected. This is not the place in which to object to the bill of exceptions; nor was it right to do so on the argument below. If there had been any irregularity to complain of, it should have been made the subject of a substantive application to the court for correction, before the case came on for argument.

Sir F Kelly in reply. There can be no doubt that the statement of law made by the judge, with all qualifications, if there were any, ought to be truly stated. But that which was written at the time is more likely to be a true statement than any thing introduced some months afterwards. The exception must truly have represented at the time what had been the direction of the learned judge, or he would not then have signed it. That which he then uttered was that which influenced the minds of the jurymen. There was, at that time, no thought of the qualification afterwards introduced. Its introduction was highly irregular, if not absolutely illegal; but the appellants were compelled to submit, or no bill of exceptions would have been signed, and then judgment would have been taken against them without their having a chance of bringing it under review. The court below being informed of the fact that the exceptions were signed at the trial, and that this addition was not made till months

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

afterwards, ought, as a matter of legal regularity, to have rejected the latter, and have looked only to the former document. The object here is not to exclude a qualification of a direction, but a qualification which the appellants do not acknowledge to have been given with the direction which is the subject of the exception.

June 26. LORD BROUGHAM. This case, which has been very fully and ably argued, presents for consideration a preliminary question of great importance with a view to practice, and especially Scottish practice, in bills of exceptions. But as no doubt can be entertained as to the judgment which ought to be given upon it, I think it better that we should at once proceed to dispose of it. I consider that there has been very great irregularity committed in this case; that the act of parliament has not only not been complied with in form, but that it has not been complied with even in substance. It has been in two several ways, if not broken, yet disregarded, and yet both of these deviations from the statute relate to matters most material for the due administration of justice.

In the first place, a trial which lasts eight days takes place in April, and gives rise to a bill of exceptions. The exceptions are tendered in writing, as by the statute they ought to be, and at that time they are signed by the learned judge. There being some difficulty and doubt respecting the correctness of the writing then made, it is copied, and there are found some verbal inaccuracies; but there is one inaccuracy which cannot properly be called verbal. The inaccuracies are corrected, and the learned judge who had affixed his signature to the body of the instrument, for greater correctness, and to prevent all mistakes, and also to show that all inaccuracy in the latter part of the instrument had been corrected, with his knowledge and with his consent, and before he signed the instrument, also affixed his initials in the margin of it.

This, then, was, at the very least, that which ought to have been the governing instrument. Most emphatically it ought, because it was done *de recenti*, when the whole facts written were within the knowledge of all parties; of the learned judge and of the counsel on either side. This was at the beginning of April. It does not much signify whether the exceptions were prepared before or after the jury retired: they were tendered before the verdict was given, and yet eight months afterwards, that is, at the end of November, the learned judge signed another and a different paper, which was afterwards presented to the court as the bill of exceptions. Is this according to the statute? No such thing. The Statute of Westminster 2 (13 Edw. I. c. 31) gives the bill of exceptions, and it is said that there is not in that statute any thing which makes the sealing of the bill of exceptions a binding and conclusive act. Perhaps not. Nevertheless the course of practice adopted by the whole profession, ever since that statute, is much to be considered. That course of practice is perfectly clear. It assumes that the bill of exceptions must be *de recenti*, if not even *de recentissimo*, drawn up and sealed. Here is the statement of the practice by my truly learned friend, the late Mr.

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

Tidd, the author of one of the very best books in the profession, most logically contrived and arranged, and which, I must say, in justice to the memory of that most industrious and remarkable man, one of the greatest benefactors to the profession, is, next to Comyn's Digest, the most perfect model of clear and logical arrangement, to be recommended to every student, as well as to every author in the law, and which is, in addition, one of the very few books in which you never look for what you want without finding it. Mr. Tidd gives, (Tidd's Forms of Practical Proceedings, 328,) with his usual accuracy, the form of bills of exceptions. Having given the judge's directions, he proceeds thus:—"Whereupon the said counsel for the said C. D. did then and there propose their aforesaid exception to the opinion of the said judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid, according to the form of the statute in such case made and provided. And thereupon the said chief justice, at the request of the counsel for the said C. D., did put his seal to this bill of exceptions, pursuant to the aforesaid statute."

This shows the opinion of the profession according to which these precedents were formed and have been used, and it shows that opinion clearly to be, that a bill of exceptions ought to be drawn immediately, and sealed as well as drawn, *de recentissimo facto*; and manifestly this is extremely useful, because it excludes the chance of error, and gives the very best possible security for accuracy, the best possible guaranty against any fraud being practised by any party, or any error, from want of due recollection, being fallen into by judges. This is the case in our English practice, and the Scotch Jury Act more particularly binds down the parties by specific provisions, which are rendered still more stringent by the act of Sederunt, of the 16th of February, 1841. Now these proceedings are to be according to the statute, which requires the exception to be put in writing, by the counsel for the party objecting, and the same to be signed by the judge. It does not say that it must be signed at the very time; but it clearly means that it shall be signed then, or, at least, within a reasonable and short time afterwards. And then the judge who presides shall forthwith put his seal thereto, that is to say, after adding a note of the issues. It does not say of the evidence also, but no doubt the practice is, that the evidence shall be added, and also the verdict, which shows that it is to be signed before the verdict, and, notwithstanding the exception so given in, the trial is to go on, and then the exception, with the order directing the issue, and the copy of the verdict indorsed, shall be presented forthwith, that is to say, immediately afterwards, or *de recenti*; so that the counsel shall present the exception to the judge, and then the cause shall go on upon that exception. Can any thing be more obvious than that this excludes the supposition of a delay of eight months, with all the risks attending it? This case is certainly voluminous; but it did not require eight days to prepare this bill of exceptions, certainly not eight months. What is the consequence? A bill of exceptions goes

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

before the court, which, by the matters before me, I am compelled to say, is not the bill of exceptions which the judge signed, and ought alone to have signed. There has been interpolated a very important part of a sentence, and whether we agree or not with Lord Fullerton's opinion¹ as to its effect or not, there is, at all events, a very material addition, of which, in my opinion, the party excepting has good right to complain. It is a great irregularity, and one much to be discountenanced, and which, I trust, will not again occur to interfere with the due execution of the Act of Sederunt, and the specific provisions of the statute.

Such is my opinion with respect to the unfortunate course that, owing to the long delay, has been followed in this case. But there can be no doubt that we are now shut out from considering what would have been the force of the exception, had not this passage been interpolated in the direction. The case is before us on a bill of exceptions tacked to a record, and though I can have no doubt that that is not the bill of exceptions signed, according to the statute, by Lord Ivory, and corrected by him, and immediately afterwards signed, both in the body and in the margin, to identify and authorize that correction, still the record is that to which alone we can now look as the bill of exceptions. It is all very well to argue, as Sir Fitzroy Kelly did, that the paper prepared at the trial was what the objecting counsel requested the judge to sign, and that he was not requested to sign any thing else, and that his power was then at an end; but, sitting here, we can know nothing of any bill of exceptions but that which is presented to us on the record, and the only bill of exceptions so presented to us is that which contains the passage objected to. I cannot take advantage of that which I have stated in my observations against this proceeding; I am excluded from doing so as much as if I did not know of the existence of an original paper; and your Lordships would be guilty of the grossest irregularity if you were to travel out of that which is before you, and to take the course suggested by the counsel for the appellants, namely, to disregard the bill of exceptions tacked to this record, and to proceed to consider the case on that which was signed at the time of the trial.

It has been contended that the appellants here are bound, because the irregularity was not made the subject of a substantive application to the court. I do not think there is any thing in that. Under the apprehension incident to a verdict of 5000*l.* damages, the learned counsel for the appellants could not well do otherwise than take the bill of exceptions as it stood, and argue it as best they might. It has been ingeniously suggested that the court had reason to suppose, from the statement of counsel, fortified by affidavit, that the proper bill of exceptions was not brought into court, and might, therefore, have removed that one, and replaced it by that which was the true

¹ His Lordship, when delivering his judgment as one of the judges of the Inner House, expressed his opinion to the effect, that the part of the direction, the introduction of which was objected to by the appellants, was, in substance, clearly implied in that statement of the direction, which they insisted ought alone to be on the record.

The Earl of Glasgow v. The Hurlet and Campsie Alum Co.

and lawful paper. I must say that I cannot conceive any proceeding more doubtful than that which has been so suggested; and I do not think it possible from any knowledge which I possess of Courts of Error, that the court could have yielded to such an application. The judge in this country is required to acknowledge his seal,—that is part of the statute, and there is no proceeding without his acknowledgment of the seal, and it is only after he has made it that the court of error becomes possessed of the bill of exceptions. His acknowledgment of the seal shuts out argument. The modern act of parliament does not say a word about the judge acknowledging his signature. The signature is supposed to identify itself. But his presenting the bill to the court is tantamount to the acknowledgment of the signature. Then it may be said, that here he presented one bill of exceptions when he ought to have presented another. But, at all events, we have that which he presented, and there cannot now be any averment against the record, which compels us to say that this is the bill of exceptions which Lord Ivory presented, tantamount to a judge in England acknowledging his seal, and that all which this bill avers upon the face of it is true, namely, amongst other things, that it was signed at the request of the party. I have, therefore, no doubt whatever that we are shut out from any other consideration on this head. I never had any doubt from the first, but I wished the argument to proceed, because of the importance of the matter in point of practice.

It is fit that these things should be considered, on account of the alarming consequences of such irregularities. The practice as to bills of exceptions is, of necessity, slovenly to some degree, because you cannot be quite certain at what time you ought to tender them. All that can be said is, that this should be done as speedily as possible after the trial. I look upon the original paper, therefore, in the light in which it must have been looked on by Lord Ivory, that is, not as the bill of exceptions, but as containing the materials for the bill of exceptions, and that after this, which I will call the draft bill, was signed, it was to be made out more formally, and signed by him when in proper and perfect form. But the bill of exceptions on the record contains a passage, the materials for which this paper did not contain: it contains a passage beyond the paper, and that passage it ought not to have contained. Over that, however, we have here no power. We can form no opinion upon it, nor will it be proper to consider its materiality; for whether material or not does not affect the question. The only question we have now to consider is, whether or not the exceptions are good in point of law.

The case was then argued on the construction of the grant of 1800.

Sir F. Kelly and *Mr. Inglis*, for the appellants. There is no ground for the proceedings taken here against the appellants. The grant of 1800 is not a conveyance of the wastes, but only a grant of the ore to be found in the wastes. It does not oblige the Earl of Glasgow, or his

The Earl of Glasgow v. The Hurlet and Campsie Alum Co.

lessees of the coal, to work the mines in a particular manner, and certainly does not prevent them from fully working their own mines, lest they should injure the produce of another mine which had not been worked as it might have been, and which was left unworked for the convenience, not to say, at the caprice, of the respondents. In such a state of things, the law does not require, and the grant here does not compel, the appellants to work or not to work their mines, so as to suit the convenience of the respondents. Nor is there any obligation that the respondents shall use only one particular mode of working the mine. There are three modes of working coal-mines in Scotland. Had the appellants used either of the other two, instead of that by *stoop* and *room*, the whole of the coal would have been cleared out at once, and the alum must then have been removed at the same time, or must have been lost. It never was the intention of the parties to allow one set of contractors or tenants to abstain at their pleasure from working the mines, and then, because the other party might, by working them, endanger what the first had refrained from removing, to prevent them from being worked. Such a mode of dealing with the property would have made it utterly valueless to its owner, whose only revenue consisted of a lordship upon what was raised from the mines. Yet the direction to the jury assumes that such was the contract, and thus gives an unfair and unwarranted advantage to the Alum Company at the expense of every other person.

Mr. Bethell and *Mr. Cockburn* for the respondents. The argument on the other side assumes that all these parties possessed equal rights in relation to each other. But that is not so. The coal-lease was granted subsequently to the alum-lease, and must, therefore, be construed subject to the rights already vested in the previously constituted lessees. Now, it is clear that the lessees of the alum were not bound to work the alum-mines in any particular manner; but the coal-lessees were bound to work the coal-mines so as not to interfere with the alum-works. There was a particular exception in their lease to that effect. It was upon this exception, coupled with the provisions in the lease to the alum company, that the direction of the Lord Ordinary was founded, and that direction was fully warranted by the ordinary rules of construction, and by the plain intentions of the parties.

July 2. LORD BROUGHAM. This case turns upon two points. We disposed of the first, respecting the additions which were made to the bill of exceptions, very irregularly, in a manner much to be disapproved of, and such as I hope will not occur in future. We disposed of that point on the first occasion of the case coming before your Lordships, and before the second argument, which was upon the merits of the case, was heard. The question now more immediately under consideration is as to the two exceptions which have been taken, and both of which bear upon the construction that is to be put upon the contract, and the leases of the coal to the defenders. The exceptions are these, [his Lordship read them.]

The Earl of Glasgow v. The Hurler and Campsie Alum Co.

I have come, upon a full consideration of this case, to the conclusion at which the court below arrived, agreeing with the learned judge who tried the cause, Lord Ivory, in the construction which he put upon the contract. And I think that the reasons given by Lord Mackenzie, with his usual clearness, put the whole question in a very striking and commanding point of view. He said: "The pillars are never mentioned in the contract, a right to work out these not being reserved while other rights are reserved," — a fact which, he said, he considered most important. It is most important, when you consider that the support of the alum by these pillars was absolutely essential to the right conveyed to work the alum-mines. That must never be left out of view where the question relates to two strata, the one superincumbent upon the other. It is further to be considered that there is a provision that the Alum Company shall have the liberty and privilege of "returning the washed ore from the alum-works, and depositing the same in any of the coal-pits at Hurler, where the limestone had been previously wrought out." There is a manifest intendment here, and in the subsequent part of the lease, that there were to be wastes, that wastes were in contemplation as the necessary accompaniments and results of the work; and that those wastes were to be kept existing as open and vacant spaces "under the roof of which," wastes, "containing alum schistus," were "to be supported by coal-pillars."

Upon the second exception I also agree with Lord Mackenzie, who justly observes, that here the matter is still clearer, and I must state that the concluding passage in the explanation of the construction given to the contract by that learned judge is most material. The whole statement of the law, he says, is laid down by Lord Ivory, and is clearly explained by the concluding words, "that all the solid coal should be worked."

I am of opinion, and have no doubt upon the subject, that the true construction was put before the jury in the direction of the learned judge, and that this construction, the objection to which was the ground of the second exception, has been rightly adopted by the court below. I am therefore of opinion against both the exceptions, and think that the decree of the court below against the bill was right.

It is wholly unnecessary to enter at greater length into the reasons and grounds upon which I have come to this conclusion, for, in truth, they are the same with those upon which the learned judges in the court below decided. I only thought it right to occupy your Lordships' attention for these few minutes, in order to note that upon the two points raised, and especially as to the first and most material exception, the reasons so forcibly put by Lord Mackenzie are sufficient to support the judgment of the court below.

Appeal dismissed, and interlocutors affirmed, with costs.

CASES
•
ARGUED AND DETERMINED
IN THE
COURTS OF CHANCERY,
DURING THE YEARS 1851-52.

MILLER v. HUDDLESTONE.¹

January 18, 20, 21, and 22, and November 5, 1851.

Will, Construction of — Annuities — Priority.

A testator gave his estate to trustees, upon trust to invest, and out of the dividends to pay two life annuities to his daughter, and other annuities to other relatives; he also gave certain legacies:—

Held, upon the construction of the will reversing the decision of the court below, that, the estate proving deficient, the annuities were not entitled to priority over the legacies, but must abate ratably; and that they were not to be paid out of the *corpus*.

In deciding upon questions of priority under a will, the mere circumstance of relationship to the testator is not entitled to much weight; it constitutes but an auxiliary reason for giving priority, where the words used in the will favor the notion of priority to a sufficient degree.

THIS was an appeal from a decree of the late Vice-Chancellor of England, (13 Jur. 719,) declaring that certain annuities given by the will of Thomas Creswick, the testator, were entitled to priority of payment over certain legacies given by the same will. The important parts of the will of Thomas Creswick, which was dated the 10th July, 1833, were in the following terms:—“ I give and bequeathe unto my wife, Sarah Creswick, all my household furniture, &c., and other effects, which shall be in my dwelling-houses at the time of my decease, together with my carriage, carriage-horses, and harness, and the sum of 1000*l.*, to be paid to her immediately after my decease, for her own immediate use; and I give, devise, and bequeathe unto the said Sarah Creswick, and to my nephews, Thomas Creswick Huddleston, William Jackson, and Paul Jackson, all my freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all the rest and residue of my goods, chattels, stock in trade, &c., to hold the same unto them, their heirs, executors, administrators, and assigns, upon trust that they, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall, with all convenient speed after

¹ 15 Jur. 1048; 21 Law J. Rep. (N. S.) Chanc. 1.

Miller v. Huddleston.

my death, convert the whole of my said trust-estate, except money in the public or government stocks or funds, into ready money, and stand possessed of the money arising therefrom upon trust to pay off and discharge all my just debts, funeral and testamentary expenses; and after such payment made as aforesaid, upon trust to lay out and invest the residue of the said money arising from such sale and collection, in their own names, or in the names or name of the survivors or survivor of them, on government stocks, funds, or securities, and to stand possessed of the stocks, funds, and securities whereon the same shall be invested, upon trust, out of the interest or dividends arising therefrom, and other income arising from my said trust-estate, to pay unto my daughter, Mary Ann Miller, the wife of George Miller, one annuity or yearly sum of 500*l.*, to her separate use, during her natural life, without any deduction for legacy-duty, or other deductions whatsoever, by equal half-yearly payments; and upon further trust, out of the said interest or dividends, to pay unto my brother, William Creswick, one annuity or yearly sum of 100*l.*, without any deduction for legacy-duty, or any deduction whatsoever, during his natural life, by equal quarterly or half-yearly payments, as may suit my said trustees; and from and after the decease of my said brother, William Creswick, upon trust to pay to my nephew, Thomas Creswick, the blind son of my said brother, William Creswick, one annuity or yearly sum of 50*l.* during his natural life, without any deduction for legacy-duty, or any deduction whatsoever, by equal quarterly or half-yearly payments, as may best suit my trustees to pay the same; and after payment of the said several annuities, upon trust to pay the remainder of the interest or dividends arising from such investment, and the rents and profits of any part of my said freehold, copyhold, or leasehold hereditaments which shall be unsold, and let on lease as hereinafter provided for, and the interest of any money which shall be lent upon security as hereinafter mentioned, unto my said wife, Sarah Creswick, or permit and suffer her to receive the same during her natural life, and also the said annuities, in case any or either of them shall cease to be longer payable to the said annuitants, any or either of them, in her lifetime, to and for her own proper use and benefit; and from and after the decease of my said wife, and during the lifetime of my said daughter, Mary Ann Miller, and if she, the said Mary Ann Miller, shall have no child or children living at the time of the decease of my said wife, upon trust to pay to the said Mary Ann Miller a further annuity or yearly sum of 500*l.* during her natural life, to and for her own sole and separate use; but if my said daughter, Mary Ann Miller, shall have any child or children living at the time of the decease of my said wife, by her said present or any future husband with whom she may hereafter intermarry, or if my said daughter shall have any child or children at any time after the decease of my said wife, then, from and after the birth of such child or children, the said two several annuities of 500*l.* each shall cease, and be no longer paid or payable to my said daughter; but I will and direct that the said Thomas Creswick Huddleston, William Jackson, and Paul Jackson, or such of them who shall be then living,

Miller v. Huddlestons.

and the trustees or trustee for the time being, shall, by sale of so much of the stocks, funds, or securities upon which my said trust estate shall then be invested as will be sufficient, raise the sum of 20,000*l.*, and after the same shall be raised as aforesaid, upon trust forthwith to invest the same in some or one of the public or government stocks or funds, in their own names, or in the names or name of the survivors or survivor of them, or of the trustee or trustees for the time being, and, after such investment, shall stand possessed of the stocks, funds, or securities upon which the same shall be invested, upon trust to pay the interest or dividends arising therefrom unto my said daughter, Mary Ann Miller, during her natural life, to and for her own sole and separate use; and from and after the decease of my said daughter, upon trust for all and every the children of my said daughter, Mary Ann Miller, &c.; and in case all my said daughter's children shall happen to die before they shall attain the age of twenty-one years, I will and direct that the said 20,000*l.*, or the stocks, funds, or securities upon which the same shall be invested, shall sink into and become part of my residuary estate hereinafter disposed of. And upon further trust, that the said trustees do and shall, after the decease of my said wife, pay the sum of 5000*l.*, part of my residuary estate, unto such person or persons, in such parts and proportions, and at such time and times as my said wife, Sarah Creswick, shall, by her last will and testament in writing, give and bequeathe, or direct and appoint the same to be paid unto, except such gift, bequest, or appointment shall be made to or for the benefit of her brother, Charles Elsee, or his wife, or his children or child; and in case such will of my said wife shall contain any gift or benefit to the said Charles Elsee, or his wife, or children, or child, then the power intended to be given to my said wife to dispose of the said 5000*l.* by her will shall cease and determine, and the said 5000*l.* shall remain part of my residuary estate hereinafter disposed of, and, except as to the sum of 1000*l.* hereinafter mentioned, upon or for no other trust, intent, or purpose whatsoever. And, subject to the trusts of this my will, I give and bequeathe the residue of my said trust-estate unto my nephews, Thomas Creswick Huddlestons, William Jackson, and Paul Jackson, and my nieces, Emma Huddlestons, Anne Garton Jackson, and Sarah Maria Jackson, equally to be divided between them, share and share alike, when and as the same, or any part thereof, shall become divisible by the deaths of the said annuitants or otherwise; it being my will and meaning, that after the payment of the said sum of 5000*l.*, of which my said wife is to have the disposal by her will as aforesaid; the said 1000*l.*, of which she is to have the disposal, either by gift in her lifetime, or by her will, to my said trustees, Thomas Creswick Huddlestons, William Jackson, and Paul Jackson, or such part thereof as she shall so dispose of by her said will, and reserving sufficient of my said trust-estate to raise and pay the said annuities given to my said daughter, or the said 20,000*l.* directed to be held for her and her children or child, in the event of her having any children or child at any time hereafter; and the said annuity of 100*l.*, given to my said brother, William Creswick,

Miller v. Huddlestons.

for life; and after his decease, of the annuity of 50*l.* given to his son, Thomas Creswick, during his life; my said residuary estate may be divided between my said residuary legatees, at any time after the decease of my said wife, as they, the said Thomas Creswick Huddlestons, William Jackson, and Paul Jackson, or the survivors or survivor of them, and the trustees or trustee for the time being, shall think proper. I do hereby will and direct that my said wife shall have power to dispose of 1000*l.*, part of my said trust-estate, or such part or parts thereof, either by gift in her lifetime, or bequests by her will, to her said three co-trustees, Thomas Creswick Huddlestons, William Jackson, and Paul Jackson, in such proportions as she, my said wife, shall think fit and proper. And my said trustees are, by this my will, directed, and empowered to pay and dispose of the said 1000*l.*, or such part or parts thereof as my said wife shall direct, either in her lifetime or after her decease, to the said Thomas Creswick Huddlestons, William Jackson, and Paul Jackson, or any or either of them."

The testator died in 1840. Sarah Creswick, the widow, died in February, 1843, having received her legacy of 1,000*l.*, and having by will made a valid appointment of the 5,000*l.*, and of 800*l.*, part of the 1,000*l.* Mary Ann Miller never had a child, and large arrears in respect of her two annuities of 500*l.* were due to her, the estate not being sufficient for payment of all the annuities, and of the two sums of 5,000*l.* and 800*l.* Mary Ann Miller filed her bill for payment of her two annuities. The question before the Vice-Chancellor, and now, was, whether the annuities ought to abate proportionably with those two sums, or whether the annuities ought to be paid in priority to them, and, if necessary, out of the corpus of the property. The Vice-Chancellor decided, that the annuitants were entitled to priority over those two sums; and that, if necessary, they were entitled to payment out of the corpus of the testator's estate, in priority to the other bequests in the will of the said testator remaining unsatisfied. From this decision the legatees appealed.

Lloyd and *Selwyn*, in support of the appeal.

Rolt and *Gifford*, *contra*.

The following cases were cited:—*Scott v. Salmond*, 1 My. & K. 363; *The Attorney-General v. Poulden*, 3 Hare, 555; *Foster v. Smith*, 2 Y. & C. C. C. 193; *Darbo v. Rickards*, 14 Sim. 537; *Leacroft v. Maynard*, 1 Ves. jun. 279; *Crowder v. Clowes*, 2 Ves. jun. 449; *Beeston v. Booth*, 4 Mad. 161; *Thwaites v. Foreman*, 1 Coll. 409; *Allan v. Backhouse*, 2 V. & B. 65; *Boyd v. Buckle*, 10 Sim. 595; *Lewin v. Lewin*, 2 Ves. sen. 415; *Brown v. Brown*, 1 Kee. 275; and *Blower v. Morret*, 2 Ves. sen. 420.

Lloyd, in reply.

The arguments are fully noticed in the judgment.

Miller v. Huddleston.

November 5. LORD CHANCELLOR. This is an appeal from an order of the Vice-Chancellor of England, made on the 2d August, 1849, when the cause came on for further directions, by which it was declared that certain annuities bequeathed by the will of Thomas Creswick, were entitled to priority over the legacies given by his said will, and payment of certain arrears due in respect of such annuities was directed to be made out of the corpus of the estate. Thomas Creswick, by his will, dated the 10th July, 1833, bequeathed the residue of his real and personal estate to his widow and three other persons as trustees, on trust to sell and invest in government securities, and out of the dividends to pay an annuity of 500*l.* to the plaintiff for life, an annuity of 100*l.* to William Creswick for life, and on his death an annuity of 50*l.* to Thomas Creswick, son of William Creswick, for life, and the remainder of the dividends to the testator's widow for her life. After the death of the testator's widow, if the plaintiff should be then living, and if she, the plaintiff, should have no child then living, the trustees were to pay a further annuity of 500*l.* to the plaintiff; if the plaintiff should have a child living at the death of the widow, the two annuities of 500*l.* were to cease, and the trustees were to raise and invest the sum of 20,000*l.*, and pay the dividends to the plaintiff for her life, with remainder to her children. The trustees were also to pay 5,000*l.* to such person or persons as the widow should by will appoint, and the widow was also to have power to dispose of 1,000*l.*, either by gift in her lifetime or by will, among her three co-trustees, in such proportions as she should think fit; and certain persons were named as residuary legatees. The testator died in 1840. The widow died in 1843, having by will made an appointment of 800*l.*, part of the 1,000*l.*, and having also made an appointment of the 5,000*l.* The plaintiff had no child at the death of the widow, and the present bill was filed for payment of the two annuities of 500*l.*

The estate of the testator in this case being deficient, two questions arise on his will: first, whether the annuities bequeathed thereby to his daughter and brother have any priority over the legacy of 5,000*l.* and the second legacy of 1,000*l.*, of which the wife was to have the power of disposing, or whether those annuities must abate ratably; secondly, whether so much of those annuities as the income of the estate is insufficient to pay is chargeable on the corpus. With regard to the first question, I am of opinion that the annuities have no priority. The rule is, that in case of a deficiency, all the annuities and legacies abate ratably; for, since they cannot all be paid in full, they shall abate ratably, on the principle of the maxim of equality is equity, and equity delighteth in equality. This rule is, indeed, subject to exceptions, for there are cases in which some annuities or legacies are to be paid in priority to others; but it is settled that the onus lies on the party seeking priority to make out that such priority was intended by the testator, and that the proof of this must be clear and conclusive. The reason is, that a testator, in the absence of clear and conclusive proof, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a

deficiency, to some of the objects of his bounty. It is true that the testator does in many cases contemplate the possibility of a deficiency, and provides against it; but I think it may be safely affirmed, that, in the absence of all indication to the contrary, it is generally to be assumed that the testator considered that his estate may be sufficient to answer the purposes to which he has devoted it, and consequently makes no provision against a deficiency; and such being the general rule, the court would not be right in saying, without clear and conclusive reasons, that he intended to provide against an event which, in general, it is not to be supposed that he ever contemplated. In *Brown v. Brown*, 1 Kee. 277, Lord Langdale observes, "The onus is on those who contended for a priority, to show that the testator meant to give a preference to a particular legatee." And in *Thwaites v. Forman*, 1 Coll. 414, Knight Bruce, V. C., makes these observations:— "*Primâ facie* all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should leave the question in doubt; they must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of the testator, we must recollect that words that are merely introductory cannot generally, by themselves, be held to direct any order of payment." We should also bear in mind an apposite observation of Sir John Leach, (I think contained in *Beeston v. Booth*,) that "unless the testator tells you himself that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes; and if you attribute that notion to him, you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient."

Now, to apply these principles to the present case. I conceive that the annuitants have failed in advancing clear and conclusive proofs of an intended priority. It seems to me to be so plain that no such proof has been or can be furnished from the language of the will, that it appears quite unnecessary to comment on particular parts of it, although there are expressions which furnish matter for argument in favor of priority, but which are much too ambiguous to be relied on in support of a preference, which, for the reasons I have mentioned, is antecedently improbable when those ambiguous expressions can be fully satisfied by another and more probable construction. If the words in *Beeston v. Booth*, 4 Mad. 161, and *Thwaites v. Forman*, 1 Coll. 415, did not import a priority, much less can the words used in this will. The words "after payment" may merely refer to the order of payment to be made, on the supposition that there was a sufficiency of assets to pay all the legacies, and do not necessarily or clearly import a preference in the event of a deficiency of assets; they are merely introductory to what follows, importing no more than would have been implied without them; and I may add that the order in which the different bequests stand in the first part of the will, even if it were material, is altered when they are referred to in a subsequent part of the will.

Miller v. Huddleston.

As to the cases in which a priority has been allowed, I may observe that *Brown v. Brown*, 1 Kee. 275, was a perfectly clear case of priority, insomuch that, as observed by Lord Langdale, there would have been no way in which effect could have been given to the words used by the testator, but by giving a priority to the second legatee. In *Boyd v. Buckle*, 10 Sim. 595, the circumstances and language were different, and the judgment so short, and so entirely limited in its application to the particular words there used, that it can afford no assistance in the decision of the present case. There is only one case calculated to insert any doubt. I allude to *Lewin v. Lewin*, 2 Ves. sen. 415. There a testator gave an annuity of 120*l*. to his wife for life, and directed his executors to purchase, if they could, the said annuity of 120*l*. in government securities of ninety-nine years, or some other longer time; or, if they could not do that, to purchase land of 200*l*. a year value, to be settled in such a way, that the said annuity should be to his wife free from taxes, with remainders over. He also directed, that if he should leave any child living at his death, his executors should, out of the profits of the residue of his estate, pay to his wife 30*l*. per annum for the maintenance of such child; and he gave legacies to some collateral relations and friends; and all the residue of his estate he directed to be put out to the best advantage for his children at his death; and Lord Hardwicke held that the annuity should not abate. He remarked, "This is a very strong case to show that this annuity, and the fund for it, was intended by the testator to be preferred to all the other legacies in the will. It is not suggested that either the wife or children have any other provision; and when a man is so situated as he was, and (as appears from other words in the will) having a prospect of more children, and no provision, by settlement or otherwise, under which his wife or children could claim, it was natural for him, in making a disposition of his estate, so to give it that their provision should be in the first place, and not to abide by the contingency of his estate producing more or less at the time of his death, and of sharing, in proportion, with others, strangers in blood, though friends to him, or collateral relations, to whom he had given legacies; it was natural he should not intend they should abide by that event, though that is the general rule of law." And again, lower down, he says, "It is said there are cases wherein the court has gone a great way to level legatees, and make them abate in proportion, as in *Brown v. Allen*, 1 Vern. 31. I do not remember the state of that case, and there may be a difference in the state of it; for if the testator says 'imprimis,' or 'in the first place, I give such a legacy,' that amounts only to the order in which he expresses his gifts in the will—to nothing more. But if he had said, 'to be paid in the first place,' and it had been in that case a provision for a wife, I should have doubted of that determination, and should have inclined to think it was a declaration of his intent that that provision for his wife should come out of the personal estate and be paid in the first place, because there is ground for that, from the preference to a wife and children unprovided for. If, indeed, in that will they all stood in equal degree, it was sufficient

ground for the court not to presume a preference ; but if it was a provision for a wife or child unprovided for, that is different." The question in the present case is between a brother and a child on the one hand, and the appointees of the wife, who are the nieces of the testator, on the other hand. But it is plain, from the words which I have quoted, that Lord Hardwicke regarded the circumstance of mere relationship, when viewed as a reason for priority, as not being itself a sufficient ground, but as constituting an auxiliary reason for allowing such priority, where the words used in the will favor the notion of a priority to a sufficient degree. I do not think, however, that the words used in this will are sufficient to establish a preference, even in conjunction with the circumstance of filial relationship ; but I confess I do not attach much weight to that circumstance. And in *Blower v. Morrett*, 2 Ves. sen. 420, Lord Hardwicke speaks of that circumstance in terms which seem to show, that, subsequently to the adjudication of the question in *Lewin v. Lewin*, he had somewhat altered his views as to the consideration which was due to the circumstance of filial relationship in the determination of questions of priority ; for in the case of *Blower v. Morrett*, he speaks of the fact of near relationship in these very qualified terms : — " There is, to be sure, some color and reason, that a man, giving a legacy or provision for his wife, may have an intent to prefer her ; because it is a duty he owes to nature ; and so of children ; whereas the others are out of mere voluntary bounty or favor." And in the same case he said, that the governing reason in *Lewin v. Lewin* was, " that the testator had constituted two residues of his estate, the first to be computed after taking out the money for the purchase of the annuity to his wife, the other to be computed after taking out the money to the pecuniary legatees."

If we must speculate on the presumable intention of the testator, I do not consider it by any means clear that the testator must be presumed to have intended a preference of his child, which might operate to the exclusion of others, for whom he has manifested an intention to make some provision. If the testator has thought fit to provide for other persons besides his children and his wife, if he has not made them the exclusive objects of his bounty in the case of the property being sufficient, he might never have intended them to be the exclusive objects of that bounty even in the event of a deficiency. He may have intended that the others should share with them in the latter case as well as in the former, and in the same proportion. And I can imagine many cases in which to give priority, on the ground of propinquity, would be to do what, in all probability, would be most foreign to the intention of the testator. Take, for example, the common instance of a legacy of a large sum to a child, and another legacy of a small sum to an aged relation, or another legacy of a smaller sum to a friend in poverty, or to an old servant, by giving priority to the child's legacy the other might lose his or her legacy altogether ; and yet in most cases this would be utterly repugnant to what it may fairly be presumed the testator would have intended had he known that there would have been a deficiency of assets. Where

the words are ambiguous, I certainly think it is allowable to consider what is the presumable intention of the testator — not, indeed, what the testator would have intended had he known that there would be a deficiency of assets, but what it may fairly be presumed he did intend to accomplish by the words used in the will. But, for the reasons which I have given, it cannot be fairly presumed that the testator intended to give a priority to his daughter, from the circumstance of filial relationship, in conjunction with the ambiguous expressions which occur in the will.

With reference to the opinion which I have formed, that those expressions are too ambiguous to be at all relied on, there is an opposite passage in Lord Hardwicke's judgment in *Blower v. Morrett*, where he says, "in most cases the court has disclaimed the laying weight on particular words; as the saying 'imprimis,' or 'in the first place,' or a direction for the time of payment: all these are always disclaimed, and that upon just and solid reason; because, if the court was upon such grounds to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expressions, and the incorrectness with which wills are frequently drawn." With regard to the second question, I think the annuities are not payable out of the corpus. As to the annuity to the brother, and the first annuity of 500*l.* to the daughter, the testator has expressly directed that they are to be paid out of the interest and dividends of the trust estate. And with respect to the second annuity of 500*l.* to the daughter, the words "in the same manner" appear to me to mean, that the second annuity is to be payable out of the interest and dividends of the trust estate, without any deduction for legacy-duty, or other deduction whatsoever, by equal half-yearly payments. To hold that they relate to the words by which the first annuity is given to the daughter's separate use, and by which her husband is expressly excluded, would be unnecessarily to construe them as mere surplusage. But, independently of the words "in the same manner," the second annuity would be payable in the same way as the first. In support of this, I may observe, that in *Crowder v. Clowes*, 2 Ves. jun. 449, Sir R. P. Arden, M. R., observed, "Lord Hardwicke has determined, that substitutional and additional legacies shall be raised out of the same fund, and subject to the same conditions." To say that the bequest of the second annuity of 500*l.* explains the bequest of the first annuity of 500*l.* is to make the more ambiguous and indefinite expressions explain the more clear and definite, and, in fact, it is to make the second bequest explain the first bequest, although the testator has himself shown, in express terms, that the second bequest was to be explained by the first, or, in other words, it is to reverse the natural and proper order of things. No argument can be drawn from the substitution of the 20,000*l.*, as the daughter is only to have the interest or dividends; and, indeed, to hold that the annuities are chargeable on the corpus, might have had the effect of taking away the provision for the children. For these reasons the decision of the Vice-Chancellor must be reversed.

 Reynell v. Sprye.

REYNELL v. SPRYE.¹

November 20, 1851.

Production of Documents.

Where an answer, admitted to be sufficient, does not admit the possession, &c., of certain documents, no allegation of falsehood or fraud will, at a subsequent stage of the suit, entitle the plaintiff, on motion, to obtain the production of such documents; the remedy under such circumstances must be either by criminal proceedings, or by a new bill.

THIS case, which had stood over for two or three motion days, for the purpose of filing affidavits and counter-affidavits, came on to be heard this day, but the evidence was not gone into, their Lordships being of opinion that the case made for the motion was, to use the expression of one of their Lordships, a demurrable statement.

Reynell v. Sprye was a suit for setting aside a deed, which had been obtained, as was alleged, by fraudulent misrepresentations and concealment. Sir J. Wigram, V. C., had decreed accordingly, chiefly on the ground that an opinion of an equity counsel, which had been taken by the defendant, had been fraudulently concealed by him. There was an appeal from the whole decree, but in the mean time the present motion was made by the defendant, alleging that, since the hearing before the Vice-Chancellor, he had discovered the existence of certain documents, which were or had been in the possession of the plaintiff and his solicitors, and which proved that the opinion, the concealment of which by the defendant had been so strongly relied on by the Vice-Chancellor, had been actually made known by the defendant to the plaintiff; and alleging further, that the plaintiff, his solicitor and counsel, being all aware of that fact, had fraudulently concealed it from the court at the hearing. There had been a cross-suit of *Sprye v. Reynell*, in which the usual charge as to documents, &c., had been made. The answer to the cross-bill admitted the possession of certain documents, but the documents alleged by the present mover to have been since discovered (and the very existence of which was now denied by the plaintiff) were not among them. The remaining facts and the nature of the motion sufficiently appear in the judgment.

The *Solicitor-General*, *Bethell*, and *Terrell*, for the motion.

Sir Fitzroy Kelly and *Shapter*, for the plaintiff, were not called on.

KNIGHT BRUCE, L. J. This is a motion by the defendant, first, for the production of certain documents; secondly, which amounts, in fact, to the same thing, that the hearing of the appeal may be postponed until the documents in question shall be produced; and, thirdly, that the defendant should be at liberty to file such supplemental bill, or to take such other proceeding, as he may be advised.

¹ 15 Jur. 1046; 21 Law J. Rep. (N. S.) Chanc. 13. *Ex relatione*, Mr. Begbie.

Reynell v. Sprye.

The grounds upon which this motion is made are, a case of fraud and wilful suppression of certain documents, and misrepresentation to the court itself, on the part of a general officer and commander of the Bath, a solicitor of long standing and of eminent respectability, and a barrister, of whom the least that can be said would amount to the same thing—a case of conspiracy, in fact, between these three persons. I mention the description of persons against whom these things are alleged, not as intimating that previous character can for an instant be put in evidence against established facts. All the allegations are, in fact, as was candidly admitted by Mr. Solicitor-General and Mr. Bethell, denied, in gross and in detail. Into the evidence for and against them—the affidavits, that is—we do not think it necessary to enter; for assuming, for the purposes of argument, every one of the allegations to be true, can we accede to this application, which is a mere motion for the production of documents, the possession of which is denied by the defendant in the cross suit in his answer? and the answer cannot of course be now impeached for insufficiency, or any thing of that sort.

Supposing, for the sake of argument, that the defendant to the cross-bill had, in his answer, untruly sworn that he had not got, and had never seen, documents which at the very time were in the possession of himself or his solicitor, which he was well acquainted with, which he had shown to his counsel, and had by his advice suppressed, and upon the supposed ignorance of which on the part of the plaintiff the judgment of the court below was based—and I do not know, Mr. Solicitor, that I can put your case higher than that—all that may form very proper matter for some criminal proceeding, for an indictment for perjury, or a motion for removing the name of the solicitor from off the rolls, or for a new bill; but how can we on motion, assuming for a moment (but of course I need hardly say, merely for the sake of argument) every thing you state to be correct—how can we order the production of documents, the possession of which the defendant to the cross-bill has, by his answer to that bill, denied? You are entitled to a full and complete answer to every interrogatory in your bill; when that is satisfactory, you are entitled to the production of all documents which the defendant admits, in the usual way; but you cannot go beyond this. The plaintiff consenting now to produce certain documents admitted by his answer in the cross-bill, and the production of which had not before and could not now be pressed, this motion must be refused, with costs; the plaintiff now, by his counsel, also consenting that the hearing shall not come on before the 15th of next month, and that the defendant may file any bill he may be advised within two months.

LORD CRANWORTH, L. J., concurred.

The motion was refused, with costs, accordingly; but an order was made by consent, under which certain documents and exhibits (produced by the defendant on this motion) were impounded; the appeal hearing was not to come on before the 15th December, and the

In re Clarke.

defendant in the original bill was, by consent, to be at liberty to file such bill as he might be advised within two months. *The Sheffield Canal Company v. The Sheffield and Rotherham Canal Company*, 1 Ph. 484, was referred to on this last point, but the point was not argued, leave being taken by consent.

• ————— •

*In re CLARKE, an Attorney.*¹

November 15, 17, and 22, 1851.

Attorney and Client — Costs of Action improperly brought — Powers of Taxing Master — Costs of Appeal when Judges of this Court differ.

The taxing master has, under the Solicitor's Act, 6 & 7 Vict. c. 73, a discretion to disallow costs he may think unduly claimed.

The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion.

An attorney is clearly responsible, unless acting on the opinion of counsel.

Semble, where, on appeal to this court, the judgment below is affirmed, in consequence of a difference of opinion between the judges, the costs will follow the result.

THIS was a petition under the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, which came by way of appeal from the late Master of the Rolls. The matter in dispute was the amount of costs of an action of replevin, which it was admitted had been improperly brought, being as entirely inappropriate, as was suggested from the bench, as an action of trover for a house, or, as put by the bar, as an action of ejectment for a horse. The retainer of the attorney was also, as regarded this particular business, denied. The taxing master had disallowed all the costs of the replevin, and the Master of the Rolls had confirmed this disallowance. There were considerable discrepancies in the evidence; but a longer recapitulation of the facts of the case, than as they appear from this short statement and the judgment, would be unnecessary. Mr. Follett, the taxing master, having been sent for by their Lordships, stated in court, that, by the practice of his office, the costs in question would have been unhesitatingly disallowed.

Roll and Miller, for the appellant, the solicitor.

Roundell Palmer, and *Southgate*, for the respondent, the client.

Roll, in reply.

Knight Bruce, L. J. My learned brother has authorized me, in

¹ 15 Jur. 1047; 21 Law J. Rep. (N. S.) Chanc. 20; *Ex relations*, Mr. Regbie.
VOL. VIII. 4

In re Clarke.

the event which has happened, of my mind being satisfied at the conclusion of the argument against the appeal, to declare at once my opinion upon it, whatever his Lordship's view may be. Accordingly, acting on this permission, I do so. I repeat, what I have already stated, that my mind has not a particle of doubt on the subject of this appeal. It is an appeal on the subject of the taxation of a bill of costs, upon a long-considered decision of a taxing master, confirmed in all points by a most careful and attentive judge; the taxing master, from whose decision this question was taken before the Master of the Rolls, having been in his day a solicitor of the first respectability and of most extensive practice. Upon such a concurrence of opinion on such a question, a court of appeal, constituted like the present, ought to be very clear before reversing the decision which has been arrived at below; but, whatever the weight of the decision appealed from, if the court of appeal be clear on the point, it is bound not to retire from the expression of its opinion, but to give judgment in accordance with its own views. Now, in the first place, the subject of the present dispute are the costs of an action of replevin claimed against Mr. B., as administrator of his late wife, and of her sister, or one of them. Neither wife nor sister were party to the action, and *prima facie*, therefore, neither of them is or ever was liable. But then, it is argued, the two ladies, or one of them, authorized or directed this action to be brought, or became liable for the costs of the action; and upon this argument evidence has been gone into on either side of a very voluminous and not very consistent nature. The evidence produced is very far from satisfying my mind that either sister authorized or sanctioned the action, or contracted or became liable to pay the costs of it. It is, in fact, I say, in my mind, very improbable that either sister ever did so; but assuming, for the sake of argument, that either sister had done so, I am of opinion that it is incumbent on the solicitor employed to show that he gave the ladies proper advice, and proper notions on such a subject, and that he had not allowed them blindly to give instructions on such a subject, which he was bound to understand, and which they must be taken to have known nothing about. There is no evidence or suggestion that he ever did so.

I agree, that, notwithstanding the impropriety of bringing any action, the client may be liable for the costs of it, if he insufficiently or falsely inform his attorney on a matter of fact, or if, being informed by his attorney of the utter madness and hopelessness of bringing such an action, he should reply—"Nevertheless, proceed with the action; whether you consider it wise or unwise, it is by this course of proceeding that I insist upon vindicating my rights;"—in such a case I agree that the client is bound. Here, however, we have no such case. Every circumstance was known, at the least, as well to the attorney as to the client, and probably much better; and if the client had directed the attorney to proceed in such an action, it was the duty of the latter to have said—"But this action is most absurd; it is impossible to succeed by it; there is not the smallest chance of getting the court to hear the case." This is the language he ought to have

In re Clarke.

held : there is not the smallest evidence to show that he ever did hold this language, or any thing like it.

It is said that the attorney, in bringing this action, acted on the advice of counsel, and that an attorney is justified in acting on that advice — nay, is bound to act on it. On the general proposition we desire to say nothing. In this case it is sufficient to remark, that the only opinion of counsel which we have before us is against the action, as indeed must have been that of any person in the smallest degree conversant with the subject. There is nothing the other way, except the recollection of Mr. M. that the opinion of two gentlemen of the equity bar had been taken in favor of the propriety of the action of replevin. However out of the usual course it may appear to have taken the opinion of gentlemen at the equity bar on a point of pleading at common law, still, as I admit that every gentleman at that bar ought to have some and that not a slight acquaintance with the principles and practice of special pleading, I might have allowed some weight to the circumstance if that opinion had been actually given and honestly acted on. But there is no evidence that such an opinion ever was given ; there is not the smallest trace of its existence ; there is no entry relating to it in the bill of costs, the subject of appeal ; no charge for it, nor for any attendance relating to it ; and I think, therefore, that Mr. M.'s recollection must have misled him, and that at the most it can only have been one of those opinions *inter ambulandum*, for which no payment is ever made, and which are proverbially known to be worth exactly what is given for them. Under every view of the case, I am of opinion that no charge as to the costs of this action of replevin can be maintained as against either of the ladies, nor consequently against Mr. B. as their representative.

The only other question is as to a sum 243*l.* 10*s.*, belonging to these ladies, or one of them, which found its way into the hands of the solicitors, and from which they seek to discharge themselves by alleging that they disposed of it in payment of various sums of money claimed as due from the ladies. It is under the circumstances an unavoidable inference, that the solicitors, when they received this money from the hands of the trustees, had notice whose the money was, and therefore they became themselves, in effect, trustees of the money for those to whom they knew the money belonged, and directly indebted (equitably indebted) and chargeable in account with it upon the commonest principles of equity. No man has a right to pay my debt without my consent ; and if he do, he is nevertheless chargeable to me. It would therefore be impossible for me to concur in sending this case to law, in the hopes of there eliciting further evidence on the point of retainer — for my judgment does not go on the ground of non-retainer merely ; and I think, besides, it is extremely improbable that any adducible evidence has been omitted in this case, which, after having been upwards of three years before the master, has now been twice examined in superior courts. I think the order appealed from wholly right, and therefore that the appeal should be dismissed. If my learned brother do not coincide in my opinion, that the petition should be dismissed with costs, I do not know how we have authority to deal with the question of the costs of this appeal.

In re Clarke.

LORD CRANWORTH, L. J. The statute which places us here says, that, if there be a difference of opinion between the judges, the result of that difference shall be, that the judgment appealed from shall be affirmed. It is therefore unnecessary for me to enter at large into the opinion I should have given, since, in whatever respect that opinion might have differed from the lucid statement we have just heard, it could not alter the judgment. I quite accede to the expediency of the delay proposed by my learned brother, for considering how the costs of this appeal are to be dealt with. I quite agree with all that my learned brother has said; yet there is some small difference in the results we have arrived at. If I were sitting here as a jurymen, I should be bound to acquiesce in that opinion entirely on both points, viz., that no authority was given either to bring the action of replevin, (independently of all considerations as to the propriety of the action,) or to apply the 243*l.* 10*s.* in the manner described. If I were sitting here as a jurymen, I say, I admit that I should be bound to negative that authority; but sitting here as a judge, I am bound to say that I am not convinced that the effect of further investigation might not be to alter my opinion, and, at least, to establish the liability of these ladies to discharge the costs of the action of replevin.

The proposition to be made out (in this view of the case) by the appellant is his legal right to assert his claim to these costs by action. Now, the statute under which the taxation takes place only intended to provide a more convenient way of ascertaining the amount of the bill for which the action was to be brought. The legislature never intended to delegate to an officer of the court the question, whether the attorney should ever have a right or not to bring an action at all; which would be the case if the taxing master could disallow whole bills, as he seems to have done here. Sitting here, therefore, not as a jurymen, but as a judge, I should have said, if there is doubt as to part of the bill, bring an action as to that part. But it is said this action is altogether so preposterous, that it was the duty of no attorney to be concerned in carrying it on, and that therefore he cannot claim to be paid for doing so. But in spite of the weight due to the officer whose opinion we have heard in court this day, I very much doubt whether, when, in taxing a bill of costs, the client denies having authorized the action, the taxing master can turn round and say that the attorney ought to have examined into the probable chances of success. If, indeed, this were within the province of the taxing master, I quite agree that this is the most absurd action that could ever have been brought. So with regard to the discharge set up as to the sum of 243*l.* 10*s.* As a jurymen, I admit that no sufficient evidence of authority for the alleged application of the money has been produced. But as a judge, I should feel disposed to try the event of further investigation, and should therefore, had I been sitting alone, have sent it to law in the same manner. However, it is of little use to state what I might have felt myself bound as a judge to do had I been sitting alone. In consequence of the difference of opinion between myself and Lord Justice Knight Bruce, the present appeal must be dismissed; and I cannot but say I am very glad that this case will in all probability go no further.

In re Clarke.

The question of costs was then shortly spoken to by *Rolt* against, and *Southgate* in favor, of the appeal being dismissed with costs.

Knight Bruce, L. J., observed, that had he been sitting alone, the appeal would certainly have been dismissed, and with costs.

Lord Cranworth, L. J., on an analogy being attempted to be drawn between this case and a case where the judges in the Court of Exchequer Chamber should be equally divided, denied it; for in such a case of equality of opinions in the exchequer chamber there would be no judgment, and therefore, of course, no costs. But here, when the judges should be equally divided, the statute directed that judgment should be given affirming the decree or order below, but said nothing as to costs. He would certainly wish, in this case, to adhere to the general rule, that costs should follow the judgment. That was another reason against drawing analogies from any court of common law, because there the rule, that costs followed the judgment, was universal, whereas it admitted of many exceptions in equity. He repeated, that he felt every inclination, as well as his learned brother, to give costs to the successful respondents, but they doubted their power, and must take a day or two to consider.

Nov. 17. Lord Cranworth, L. J., now stated, that the appeal being dismissed, in consequence of the difference of opinion between their Lordships, it would be dismissed with costs, on two grounds: first, because the difference felt by himself from Lord Langdale's decision was not because he thought that decision wrong, but because he thought it was perhaps premature; that if a case had been sent to law, further information might have been obtained, which perhaps might, but perhaps might not, have induced him to vary the decision; and secondly, because, deciding on the materials before Lord Langdale, and also on this appeal, his Lordship had no doubt, and would have given the same decision had he been sitting alone. The appeal, therefore, must be dismissed, and the costs must follow the result.

Rolt then alleged, that, on the materials produced, there was some evidence of authority to apply the sum of 243*l.* 10*s.* in the manner sought to be established.

Neither of the counsel for the respondents being in court, their Lordships were of opinion, that if there were any fact which bore materially on their judgment, it ought to be mentioned in the presence of all parties, and they directed the same to be mentioned again.

Nov. 22. *Rolt* now referred to the book upon which he relied; but it was denied that it had been produced in the taxing master's office.

Knight Bruce, L. J. If this book were to be now introduced in the case, it would leave the case no better for the attorney. In this

Monypenny v. Dering.

most unequal contest between two women and a solicitor, justice and expediency require that the educated man should suffer. I think justice has been done in this case, not only in point of form, but in point of reason and expediency.

Roundell Palmer asked for the costs of the day.

Roll. The order will be drawn up as of this day's date.

MONYPENNY v. DERING.¹

July 18, 1851.

Will — Shifting Clause — Construction.

A testatrix, by her will, devised certain real estates to the use of M. J. for life; with remainder to the use of the sons and daughters of M. J. successively in tail; with remainder to the use of S. M., daughter of J. M., for life; with remainder to the first and other sons of S. M. in tail; with remainder to the daughters of S. M. as tenants in common in tail; with remainder to P. M., son of J. M., for life; with like remainders to the sons and daughters of P. M. in tail; with remainder to T. M., another son of the said J. M., for life; with like remainders to the sons and daughters of T. M. in tail; with divers remainders over: provided, that if P. M. and T. M., or either of them, their or either of their issue, or any other son or sons of the said J. M., or his or their issue, should become entitled to an estate of freehold or inheritance of possession of or in certain other real estates in Kent or of belonging to R. M., elder brother of the said J. M., "so as to be in the possession or in the actual receipt of the rents and profits thereof," then, and in that case, the said estates devised by her will should shift from the person so becoming entitled, in manner therein mentioned. At the date of the will, R. M. was entitled to real property in Kent in fee, and also in tail. These estates were subsequently disentailed and devised, and so came to the son of T. M., who was then entitled in possession to the other devised estates, by limitation as a purchaser, and not by inheritance, or under the original limitations existing at the date of the testatrix's will:—

Held, that this did not prevent the shifting clause from taking effect.

ELIZABETH JODDRELL, by her will, dated the 4th May, 1767, after charging all her real estates with the payment of her debts and funeral expenses, gave and devised all and every the manors, messuages, lands, tenements, and hereditaments whatsoever, situate and being in the counties of Kent and Sussex, whereof or wherein she was seized, or had or was entitled to any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, unto John Morris and William Ward, to the use of Mary Jefferson, spinster, and her assigns, during her life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the sons and daughters of the said Mary Jefferson successively in tail; and on failure of such issue, to the use of her goddaughter, Sylvestra Monypenny, daughter of her cousin James Monypenny, of Greenwich, and her assigns, for life; with remainder to the first and other sons of the

Monypenny v. Dering.

said Sylvestra Monypenny successively in tail; with remainder to her daughters as tenants in common in tail; with remainder to the use of Phillips Monypenny, second son of James Monypenny, of Greenwich, for and during his life; with remainder to trustees to preserve contingent remainders; with remainder to the sons and daughters of the said Phillips Monypenny in tail, in like manner as to the sons and daughters of the said Sylvestra Monypenny; with remainder to the use of Thomas Monypenny, third son of the said James Monypenny, of Greenwich, and his assigns, during his life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first, second, third, and other sons of the said Thomas Monypenny, severally, successively, and in remainder, one after another, as they and every of them should be in priority of birth, and the several and respective heirs of the body and bodies of all and every such son and sons issuing, the elder of such sons, and the heirs of his and their body and bodies issuing, being always preferred, and to take before the younger of such sons and the heirs of his and their body and bodies issuing; and for default of such issue, to the use of all and every the daughter and daughters of the said Thomas Monypenny in tail; with divers remainders over: and it was thereby provided, that if the said Phillips Monypenny and Thomas Monypenny, or either of them, their or either of their issue, male or female, or any other son or sons of the said James Monypenny, of Greenwich, thereafter to be born, or his, their, or any of their issue, male or female, should at any time or times be or become entitled to an estate of freehold or inheritance in possession of or in the messuages, lands, tenements, and hereditaments in the said county of Kent of or belonging to her cousin Robert Monypenny, Esq., of Rolvenden, elder brother of the aforesaid James Monypenny, of Greenwich, or the greatest part of the same messuages, lands, tenements, and hereditaments, *so as to be in possession or in the actual receipt of the rents and profits thereof*, then, and so often as the case should so happen, the use and estate which was thereinbefore devised or limited to, or which by virtue of her will should come to or devolve upon, the said Phillips Monypenny or his issue, male or female, or the said Thomas Monypenny or his issue, male or female, or any other son of the said James Monypenny, of Greenwich, thereafter to be born, or his, their, or any of their issue, male or female, so becoming entitled in possession as aforesaid of and in the said manors, messuages, lands, tenements, and hereditaments thereinbefore devised, should immediately from thenceforth cease, determine, and be void, as if the said Phillips Monypenny, and such other son and sons of the said James Monypenny, of Greenwich, thereafter to be born respectively, and his and their issue, male and female, so becoming entitled in possession as aforesaid, was and were then actually dead without issue, male and female, of his and their body and bodies; and then and from thenceforth the said manors, messuages, lands, tenements, and hereditaments thereinbefore devised should go and remain to and to the use of such person and persons as by virtue of the uses and limitations thereinbefore contained would then be enti-

Monypenny v. Dering.

tled as the next persons in remainder, in case the said Phillips Monypenny or Thomas Monypenny, or such other son or sons of the said James Monypenny, of Greenwich, thereafter to be born respectively, or his or their respective issue, male or female, so becoming entitled to the said manors, messuages, lands, tenements, and hereditaments then of or belonging to the said Robert Monypenny, or the greatest part thereof, as aforesaid, was or were actually dead without issue, male or female, of his, her, and their body and bodies; and the same person or persons should, in every such case, be entitled to take the same estate and estates in the said manors, messuages, lands, tenements, and hereditaments thereinbefore devised, as he, she, or they would have been entitled to take therein by virtue of that her will if the said Phillips Monypenny or Thomas Monypenny, or such other son or sons of the said James Monypenny, of Greenwich, thereafter to be born respectively, or his or their respective issue, male or female, so becoming entitled to the said messuages, lands, tenements, and hereditaments then of or belonging to the said Robert Monypenny, or the greatest part thereof, was or were then actually dead without issue, male or female, as aforesaid.

The said Elizabeth Joddrell died on or about the 17th March, 1775, without altering or revoking her said will. Mary Jefferson, the devisee firstly named in the said will of the said Elizabeth Joddrell, died in the year 1804, (having been previously married,) without issue. Sylvestra Monypenny, the devisee secondly named in the said will, upon the decease of the said Mary Jefferson without issue, became entitled in possession to the said estates thereby devised as tenant for life thereof, and she entered into possession of the same accordingly. In 1767, at the date of the said will of Elizabeth Joddrell, the messuages, lands, and hereditaments of or belonging to the said Robert Monypenny, in the county of Kent, consisted of certain messuages, lands, and hereditaments, of which he was tenant in fee in possession, and of a mansion-house called "Maytham Hall," and certain other messuages, lands, and hereditaments, of which he was tenant in tail in possession; with remainder to his next brother, the said James Monypenny, of Greenwich, in tail; with remainder to the other sons of their father, James Monypenny, of Pitmilly, and Mary his wife, successively in tail; with remainder to the daughters of the said James Monypenny, the father, and Mary his wife, as tenants in common in tail; with remainder to the right heirs of the said James Monypenny. James Monypenny, of Greenwich, thereupon became tenant in tail in possession of the Maytham Hall estates; he suffered a recovery to bar the entail, and died, having devised these estates to his wife for life, with remainder to the said Phillips Monypenny for life, with remainder to his first and other sons in tail, with divers remainders over. In 1826 the said Phillips Monypenny, on the death of the widow of the said James Monypenny, of Greenwich, became entitled in possession to the said Maytham Hall estates for his life, under the limitation in the said will of the said James Monypenny, of Greenwich. Phillips Monypenny was at the same time also entitled, under the said will of Elizabeth Joddrell, to an estate for his life,

Monypenny v. Dering.

with remainder to his issue in tail, in the Joddrell property, expectant on the decease of the said Sylvestra Hutton, (formerly Sylvestra Monypenny,) the then tenant for life thereof. In 1827, Phillips Monypenny, believing himself the tenant in tail thereof under the said will of James Monypenny, suffered a recovery of the Maytham Hall estates to enure to the use of himself in fee. It has since been decided that he was only tenant for life of those estates, and that his recovery was inoperative. (7 Hare, 568.) In 1830, Thomas Gybbon Monypenny, the eldest son of Thomas Monypenny, and the next in remainder under Mrs. Joddrell's will to Phillips Monypenny, conceiving that the shifting clause in that will had taken effect, suffered a recovery of the Joddrell estates, with the concurrence of Sylvestra Hutton, by which his remainder in tail was converted into a remainder in fee. In 1836, Sylvestra Hutton died without issue, and Thomas Gybbon Monypenny entered into possession of the Joddrell estates as tenant in fee. In 1837, certain deeds were executed, by which Phillips Monypenny conveyed and released all his interest in the Joddrell estates to Thomas Gybbon Monypenny, and Thomas Gybbon Monypenny conveyed and released all his interest in the Maytham Hall estates to Phillips Monypenny. Upon reference to the master (see 7 Hare, 601,) he found, that, upon Phillips Monypenny becoming entitled in possession to the Maytham Hall estates, the event happened on which the devised estates of Elizabeth Joddrell were, under the shifting clause in her will, to shift to Thomas Monypenny, the devisee fourthly named in her said will, and his issue, and that the said estates accordingly shifted to the defendant, Thomas Gybbon Monypenny, the first son of the said Thomas Monypenny, the said Thomas Monypenny being then deceased; and that the said Thomas Gybbon Monypenny thereupon became tenant in tail of the said devised estates in remainder expectant upon the estate limited to Sylvestra Monypenny and her issue. To this report exceptions were taken. The cause now came on to be heard upon these exceptions, and on further directions.

Malins, Faber, and Berkeley, in support of the exceptions, contended that the shifting clause in Mrs. Joddrell's will did not operate as found by the master, because in the interval between the date of Mrs. Joddrell's will and December, 1826, when Phillips Monypenny came into possession of the Maytham Hall estates, those estates had been so dealt with that Phillips Monypenny took them by purchase, and not by any course of succession, or under any limitation existing at the date of Elizabeth Joddrell's will; and that, therefore, the shifting clause had not taken effect. They cited *Fazakerley v. Ford*, 4 Sim. 390; *Taylor v. Lord Harewood*, 3 Hare, 372; *Tayleur v. Dickinson*, 1 Russ. 521; *Spencer v. Spencer*, 8 Sim. 37; and *Saville v. Saville*, 2 Atk. 458.

Russell, Bacon, Elmsley, Willcock, Cotterill, Boston, F. T. White, Browell, and C. Hall, for other parties.

Smeathman v. Bray.

KNIGHT BRUCE, V. C., said, that at the time the testatrix's will was made, Robert Monypenny was seized in fee simple in possession of part of certain estates in Kent, and was tenant in tail of the other part. The testatrix, in her will, spoke of "the messuages, lands, tenements, and hereditaments, in the county of Kent, now of or belonging to my cousin, Robert Monypenny;" and his Honor thought that, by that language, she must be taken to mean all the real estate held by Robert Monypenny, in fee as well as in tail. These estates comprised the Maytham Hall estate, which formed the greater part of the aggregate, and consisted partly of freehold and partly of entailed estate. The question was, whether this part of Robert Monypenny's estates had so devolved that the issues of Thomas Monypenny were "now in the possession or in the actual receipt of the rents and profits thereof." In the very words of the testatrix, the very event mentioned by her had happened. [His Honor read the shifting clause in Mrs. Jodrell's will.] The event mentioned in that clause had literally happened. But it was said, that the testatrix did not point to that event which had actually happened, because, under Robert Monypenny's will, and in consequence of his death without issue, and the recovery by James Monypenny, the estate had been taken by the issue of Thomas Monypenny by purchase. It would not be reasonable to say, that an estate thus acquired was not within the spirit and reason of the testatrix's will; and, in the present instance, the spirit and letter of the will were consistent with the master's finding, that the shifting clause had taken effect. The exceptions must, therefore, be overruled.

—♦—

SMEATHMAN v. BRAY.¹

July 26, 1851.

Claim—Foreclosure—Form of Order—Inquiry—Incumbrances.

A mortgagee, having separate mortgages created by the same mortgagor on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of debts, but can only foreclose each separately on non-payment of what is secured upon it.

Where foreclosure is sought by claim, an option is given to the plaintiff, at the hearing, to take either the common order for foreclosure, or an inquiry as to the existence of other incumbrances, suspending the order for foreclosure till after the report.

The claim was filed for foreclosure.

Southgate said that there were two separate mortgages affecting separate estates, both effected by the same mortgagor to the same mortgagee. The mortgagee had the legal estate of both estates. He submitted that the mortgagee was entitled to treat the mortgages

¹ 15 Jur. 1051.

Thicknesse v. Acton.

as one security, and to foreclose both estates on non-payment of the aggregate amount of the mortgaged debts.

Joshua Williams, for the mortgagor, objected to the proposed amalgamation of securities, and insisted that the mortgagee could only foreclose each estate separately on non-payment of what was secured upon it; for this there was distinct authority. *Holmes v. Turner*, 7 Hare, 367, note.

Sir G. TURNER, V. C., said he thought the authority cited was decisive upon the question. As this was a claim, and that form of proceeding did not give the plaintiff any discovery from the mortgagor as to the existence or nonexistence of subsequent incumbrances, which might create a defect in the title to be acquired under the decree, he should in this case, and in all cases of foreclosure by claim, give the plaintiff the option either of taking an inquiry before the master as to other incumbrances, suspending the final decree until the report, or of taking the common decree of foreclosure in the first instance.

Southgate elected to take a decree for foreclosure at once; whereupon a decree was made for foreclosure of each mortgage separately.

THICKNESSE v. ACTON.¹

November 21, 1851.

Process — Attachment — Married Woman.

An attachment for want of answer will issue against a married woman who, having appeared separately, and obtained an order to answer separately, nevertheless allows the time for answering to expire.

Kinglake asked for an order for an attachment against a defendant, a married woman. It appeared that this defendant had appeared separately, and had obtained an order to answer separately. She had, nevertheless, allowed the time for answering to expire. In support of the application, he produced an office copy of an order for an attachment under similar circumstances, made at the Rolls, in the case of a Mrs. Lydia Taylor.

Sir G. TURNER, V. C., directed that an attachment should issue, observing that he did not see what other process could be had.

Simpson v. Chapman.

SIMPSON v. CHAPMAN.¹

November 9, 1851.

Materiality of Discovery of Relief prayed — Exceptions for Scandal to material Discovery overruled.

A, B, and C, were partners. A died, having bequeathed his residuary property to G. S. and H. S. equally. H. S. thereupon assumed to act as partner in the place of A., and employed the assets in the business. A bill was filed by G. S. to administer A's estate, and for an account of the assets employed by H. S. in the business. The bill alleged that the partnership was now to be wound up, denied the right of H. S. to be a partner, and stated that B, another of the partners, had been, since some time before A's death, imbecile, and incapable of transacting business. This last statement, and the interrogatories founded upon it, being excepted to:—

Held, that B's state of mind during this time was a material fact in considering whether H. S. was properly a partner, and whether it was possible now to wind up the partnership business. The exceptions were overruled.

THIS was an administration suit against the executors of one T. S., who during his life had carried on the business of a banker in partnership with two other persons, J. C. and A. C. The testator, T. S., by his will, bequeathed the residue of his property to the plaintiff and H. S., in equal moieties, and appointed the said J. C. and H. S., and T. B. S., executors of his will. In May, 1843, the testator died. G. S., one of the residuary legatees, now filed this bill for the administration of the estate of T. S. The bill, in addition to seeking the ordinary relief in an administration suit, stated that after the death of the testator, H. S. acted as a partner in his place, and employed his assets in the business, and that it was now intended to wind up the partnership affairs; it denied the right of H. S. to be a partner, and prayed that all portions of the testator's estate, employed by H. S. in the business since the testator's death, should be accounted for as part of the residuary estate. The answer to the original bill demurred to part of the discovery sought. It was excepted to, but the exceptions were overruled. The bill was then amended, by introducing a particular statement, that A. C., one of the partners, had been, since some time previous to the testator's death, imbecile, by reason of age, and incapable of transacting business. To this statement, and the interrogatories founded upon it, separate exceptions were taken.

Roundell Palmer and *Cankrien*, for the exceptions, said that the matter objected to was not very long, but most offensive in its nature. The exceptions were to the statements, and the interrogatories founded upon them, which sought to establish that one of the partners was imbecile, by reason of age, and had been incapable of transacting business during a period of ten years. The consequence of this, if it were made out, would be, that every act done by him during that time would be liable to be called in question. They contended that this question of competency of the partner was not material, however

Re The Imperial Salt and Alkali Company.

it might be answered, with reference to the relief prayed. They cited *Ex parte Simpson*, 15 Ves. 477; *Corbet v. Tottenham*, 1 B. & B. 59; 2 Moll. 319; *The Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Pearson v. Knapp*, 1 My. & K. 312; Wig. Disc. 165-169, 2d ed.; *Small v. Attwood*, Wig. Disc. 168; and Mitf. Plead. 306, 312.

Malins and J. V. Prior, for the bill.

Sir J. PARKER, V. C. T. S., the testator, was in partnership with J. C. and A. C., without articles, each partner being entitled to one-third. T. S. died in May, 1843; his executors were J. C., one of his partners, and H. S. and T. B. S., two of the defendants. The residuary legatee, G. S., is the present plaintiff. The bill is filed for the administration of the testator's estate, and that the proper accounts may be taken; and it asks for special relief in respect of two matters. The bill states, that after the death of the testator, H. S. assumed to be, and has acted as if he were, a partner, in the place of the testator. The bill denies the right of H. S. to make himself a partner for his own benefit, and seeks that all portions of the testator's estate, applied by him to the purposes of the partnership, shall be accounted for as part of the residuary estate. Now, in deciding the question whether H. S. was or was not properly a partner, it cannot be said to be immaterial whether he became a partner simply on his own account, and with the consent of J. C., or with the valid concurrence of A. C., who is the only person not connected with the testator's estate. I cannot decide, at this time, whether he did not or could not give that concurrence. The bill states that he could not, on account of the imbecility of his mind. The other ground is, that there is a statement that the affairs of the partnership are now intended to be wound up. There is a partnership now to be wound up, in which the testator's estate is materially interested; and surely it is a material circumstance for the court to know whether one of the partners is or is not a party able to consent to and concur in the acts necessary to wind up the partnership; or whether, in winding it up, there are to be dealings with a person capable or incapable of giving his consent. The exceptions must be overruled.

Re THE JOINT-STOCK COMPANY'S WINDING-UP ACTS, 1848 and 1849;
and *re THE IMPERIAL SALT AND ALKALI COMPANY*.¹

November 18, 1851.

*Winding-up Acts—Reserved Bidding at Sale of Company's Property—
Notice to Contributories.*

The master to whom the winding-up of a company is committed has no discretion, under the above acts, to order the official manager to attend him for the purpose of fixing a reserved

¹ 15 Jur. 1053.

Re The Imperial Salt and Alkali Company.

bidding, for the intended sale of the company's property, privately, without giving notice to the contributories, or allowing them to be present.

In this case *Roxburgh* moved, on behalf of some of the contributories in the above-named matter, that an order of the master might be reversed or varied. By this order, dated the 25th November, 1851, the master directed that the official manager should attend him privately for the purpose of fixing a reserved bidding, upon the sale of the company's works, without notice to the said contributories, and that the said contributories should be excluded from attending before him upon the proposing and discussing of such reserved bidding. The property had been put up for auction before the order, without success.

Roxburgh argued, that sect. 38 of the act of 1848 gives the contributories a right to attend. [This section is partly stated in the judgment.] He also referred to sect. 118, which enacts, that the general practice of the court shall apply to proceedings under the act; and cited the case of *Jervoise v. Clarke*, 1 J. & W. 389.

C. Locock Webb, for the official manager, referred to a memorandum made by the master, stating, in effect, that the official manager had submitted to him that it would be inexpedient that the grounds on which he should propose to fix the amount of the reserved bidding should be known; that some of the contributories whom he had appointed to attend the general proceedings insisted, that they had a right to have notice of the attendance before him to fix the bidding, and see all the documents and materials which should be laid before him, and also to be heard; that the master thought this matter was of a private nature, and declined to order that the contributories should be served with notice. He referred to sect. 37 of the act of 1848.

Sir J. PARKER, V. C., said that the question was, whether the master had any discretion in the matter. His honor did not see that the master could have any such discretion. Sect. 38 enacted, "that all persons whose names should stand in the list of contributories should be entitled to require, and at their own expense to receive, notice, as the master should direct, of all or any of the proceedings in the matter of the dissolved company, and also should be entitled, at their own expense, either personally or by solicitor or agent, to attend the proceedings." If this were one of the proceedings referred to, the master had no discretion to prevent the attendance of the contributories on this occasion. The motion must be granted; the costs to come out of the estate.

Bailey v. Bolt. — *Ex parte* Hall.

BAILEY v. BOLT.¹

November 13, 1851.

Legacy-Duty.

A testator devised his real and personal estates subject to the payment of a clear yearly rent-charge or annuity of 100*l.* to S. G.:—

Held, that the legacy-duty was chargeable on the testator's estate, and that the annuitant took the annuity free of legacy-duty.

THIS case came before the court on a special case, under the provisions of the 13 & 14 Vict. c. 35, as to the construction of a clause in the will of a testator, whereby he gave his real and personal estates to his wife for life, subject to one clear yearly rent-charge or annuity of 100*l.* which he willed should be paid and payable to Sarah Gregory; and he devised the estates over on his wife's decease. The question was, whether the annuitant took the annuity clear of legacy-duty. It appeared that the personal estate was insufficient to pay the annuity, which consequently fell upon the real estate.

S. Smith, for the annuitant, cited *Courtoy v. Vincent*, Turn. & R. 433; *Barksdale v. Gilliat*, 1 Swanst. 562; *Gosden v. Dotteril*, 1 My. & K. 56; and *Gude v. Mumford*, 2 Y. & C. 448.

Forster, contra, cited *Sanders v. Kiddell*, 7 Sim. 536, and *Morris v. Burton*, 11 Sim. 161.

Sir JOHN ROMILLY, M. R., decided that the annuitant was entitled to be paid her legacy free of legacy-duty.

Ex parte HALL; *in re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.²

November 8, 1851.

Costs — Alleged Contributory — Official Manager — 11 & 12 Vict. c. 45, ss. 104, 118.

In appeals under the joint-stock companies winding-up acts, this court is not bound by the existing practice in chancery, of not giving a successful appellant the costs of the appeal; but has, under the 104th section of the 11 & 12 Vict. c. 45, a discretion as to the costs of the appeal, and also as to all previous costs.

Official managers who succeeded before the master, and also before the inferior court, in placing and retaining a person on the list of contributories, but who failed upon the contributory's appeal to the Lord Chancellor, ordered to pay the costs of the appeal, and all previous costs.

Ex parte Hall.

In this case the master placed John Hall on the list of contributories to the above company. Hall appealed from that decision to Knight Bruce, late Vice-Chancellor, to whose court the matter was attached, who affirmed the decision of the master with costs, but considered that the name ought to be on the list, with a qualification of liability from the 23rd March, 1842. 13 Jur. 693. Hall appealed from that decision, and the official managers also appealed from that part of it which limited the liability of Hall. Both appeals came on together before Lord Chancellor Cottenham on the 10th November, 1849, 13 Jur. 951, when his Lordship intimated his opinion that Hall's name ought not to be on the list of contributories at all, but gave liberty to the official managers to take such proceedings at law against Hall as they might be advised. No proceedings were taken at law; and on the 31st July, 1851, the case was again brought before Lord Truro, C., who made an order discharging the order of Knight Bruce, V. C., and the order of the master, and directing the name of John Hall to be struck out of the list of contributories of the said company, with costs against the official managers. The minutes of this order, as drawn up by the registrar, contained the following as to costs:—
 "Let the official managers of the said company pay unto the said John Hall his costs incurred by him in defending the proceedings of the said official managers against him in this matter before the said master, and the costs of the said John Hall of his application to the Vice-Chancellor of the 18th January, 1849, and of his said application of the 10th November, 1849, and of this application, and of the application of the said official managers of the 10th November, 1849, such costs to be ascertained by the master charged with the winding-up of the said company." This was a motion, on the part of the official managers, to strike out of the said minutes so much thereof as directed payment of costs to the said John Hall.

Bacon and *J. V. Prior*, in support of the motion, contended that it was contrary to the practice of the court to give costs upon reversing the decision of the inferior court; that the official managers were bound to support the decision of the master, *a fortiori* so much of that decision as was affirmed by Knight Bruce, V. C.; and they submitted, that the liability of the official managers, as to payment of costs, should be confined to the costs of their own appeal.

Malins and *Hallett*, *contra*, contended that the ordinary rule of the court as to costs did not apply to the present case; that it was quite evident that when this new mode of proceeding for winding up joint-stock companies was established, it was supposed that a state of circumstances might arise to make it exceedingly unjust that any rule of the Court of Chancery should have the effect of fixing parties with costs who should ultimately be decided not to be contributories; and that accordingly the 104th section of the Act 11 & 12 Vict. c. 45, provides, "that the costs of all proceedings which shall take place before the court shall be in the discretion of the court." That something

Ex parte Hall.

more, as to costs, was intended by this clause than what the settled practice of the court would give.

[LORD CHANCELLOR. That section gives the court discretion as to the costs of all proceedings *before the court*; proceedings before the master are dealt with by the 103rd section.]

The whole proceedings, including those before the master, are before the court; and it has been the settled practice in these cases, where an alleged contributory has appealed from the master's decision, and succeeded, to give him the costs of the proceedings in the master's office. That the only difficulty was as to giving Hall the costs of the present appeal, but that that was decided in his favor in the case of *Ex parte Riddell*, 1 Sim. N. S. 432; and that the court had clearly this power under the 104th section.

Bacon denied that there was any such settled practice as alleged.

LORD CHANCELLOR. It is stated by Mr. Malins that the settled practice has been in one direction, and that Knight Bruce, V. C., has usually given the costs of the alleged contributory incurred in making his defence in the master's office, where he was of opinion that the adverse decision was wrong. Of course, assuming such a practice to have been general, I should have contented myself by simply following that practice; but I am assured that this practice has not been general; and it is doubtful whether the rule, if there be any, applies to this case. I must, therefore, in the absence of any rule, form my own opinion. Now, notwithstanding the rule of this court, and of the House of Lords, that an appellant succeeding is not entitled to his costs of the appeal, it has frequently been considered to bear harshly, and justice has often been purchased at a price equal and greater than the value of the subject-matter in dispute. Now, I do not think, that if general rules were now to be framed on questions of costs, it would be declared by them that in no case an appellant succeeding on his appeal should have his costs. When, therefore, we have a new law passed establishing an entirely new mode of procedure, I think one ought to be well satisfied that a rule of the court is founded in justice, before it is held to be binding in that new practice. Now, I do not find any ground to the conclusion that such a rule does stand in that situation.

Bacon referred his Lordship to the 118th section of the act, particularly to the latter words—"And the general practice of the Court of Chancery in England and Ireland, in suits pending in the same courts respectively, so far as the same shall be applicable, and so far as the same is not or shall not be inconsistent with this act, or with any rules or orders to be made under this act, shall apply to all proceedings under or by virtue of this act."

LORD CHANCELLOR. It was necessary in this act to refer to some rule or standard for the regulation of the proceedings under it, and this 118th section undoubtedly refers to the general practice of the

Ex parte Hall.

Court of Chancery, "when not inconsistent with this act." If, then, the question of costs was not touched by the other actions of the act, this 118th section might, perhaps, be construed as importing into the act the rule of the Court of Chancery as to costs; but it is pretty clear that the 104th section supposes some deviation from the established rules as to costs. Then, when the 118th section says that the general practice of the court is to prevail, except where inconsistent with this act, and it is found that, by the general practice of the court, an inflexible rule exists which prevents the court exercising a discretion — and the 104th section expressly gives the court a discretion as to costs of all proceedings — I think that the 104th section meant to give a discretion to depart from that general rule, and that it must be taken in contradistinction to that general rule, the act wisely foreseeing that the reasons for the rule as to costs in ordinary suits might frequently be inapplicable to the various circumstances which might arise under this act. Therefore, fully recognizing the rule of this court not to give the costs to a successful appellant, but remembering at the same time that all the courts of law give them, it seems to me that the power of giving these costs to a successful appellant is a power which this act intended to give the court. I therefore repeat, that if I found that the courts had been in the habit of giving or withholding these costs, I should have paused before I adopted a different construction; but I think it is not established that there has been any general rule one way or the other. Now, I find that it was intended, by the 103rd section, that the costs of the proceedings in the master's office should be dealt with by the master; it declares that the costs of all matters in which creditors or contributories, or alleged contributories, shall be interested, shall be in the discretion of the master; that shows that it was intended that these costs should depend upon the judicial view of the master; but if not, then this discretion is carried with the case to the appellate court. Therefore it seems to me, that the court has jurisdiction and discretion over the costs incurred in the master's office.

The question only remains, how this discretion is to be regulated. I see no reason whatever, why a party who is summoned before the master, at the instance of the official manager, should be in a different situation as to costs from a party summoned for any other pecuniary demand before the other courts. I think the legislature in this case distinctly recognized this principle, and gave that power to this court which justice called for. I therefore think that it is in the power of this court to give the costs of the proceedings before the master to the person who ultimately establishes that he ought never to have been placed on the list of contributories; and I think that Hall is entitled to those costs. As to the costs of the appeal, I do not think, for the reasons before stated, that this act of parliament is of such a nature as to make it proper to say, that the inflexible rule as to the costs of an appeal should be imported into this new mode of proceeding. I think, therefore, that Hall is entitled to the costs of his defence in the master's office, the costs of his motion before Knight Bruce, V. C., and

Schofield v. Cahuac.

the costs of the appeals from his decision together with the costs of the present application.

Order to stand as drawn up, with the addition of the costs of the present application.

SCHOFIELD v. CAHUAC.¹

July 2, and 24, 1851.

Will — Construction — Beneficial Interest.

A testator, being possessed of real estate in England and Canada, by his will, made in England in 1801, devised all his estate to trustees, upon trust to sell, and to divide the net proceeds between his brothers and sisters and their children. In 1804, the testator went to Canada, and by a codicil made there in that year, he devised and bequeathed all his real and personal estate in Canada to other trustees resident there, upon trust to convert the same, and out of the proceeds to pay his debts in Canada, and legacies, and to remit the surplus to one of the trustees named in his will, to whom the testator gave all the residue of his estate and effects, in Canada or in Great Britain, not otherwise disposed of by that codicil, or by his will then in England, to hold to him, his heirs, executors, administrators, and assigns for ever; and the testator thereby revoked every thing contained in his will which might be construed to be contrary to the above disposition of his said estates:—

Held, that this devise took the surplus proceeds of the sale of the property in Canada beneficially.

THOMAS SCHOFIELD, the testator in this cause, who was possessed of real estate in England and Upper Canada, by his will, made in England, and dated the 13th May, 1801, after making certain bequests, gave the residue of his real and personal estate to Louis Gruaz and John Radcliffe, (a nephew of the testator), upon trust to sell, and to divide the proceeds, after payment of costs and charges, between the testator's brothers and sisters and their children, as in the will mentioned. In 1804, the testator went to Canada, and by a codicil made there, and dated the 5th December, 1804, he devised and bequeathed all his real and personal property in Canada to Alexander Wood and Robert Henderson, both residing in Canada, upon trust to sell, and to pay his debts in Canada, and legacies to persons there, and to remit any surplus remaining in their hands from the sale and proceeds of his said real and personal estates unto John Radcliffe, "to whom," the codicil proceeded, "I give, devise, and bequeathe all the rest and residue of my estate and effects, of what nature or kind soever, in the said province, or in Great Britain or elsewhere, not otherwise disposed of, or willed, or bequeathed by this codicil, or by my last will and testament, now deposited in my desk, in the care of Louis Gruaz, warden of the Tower of London, to hold the said residue of my estate and effects unto him, the said John Radcliffe, his heirs, executors, administrators, and assigns for ever; and I do hereby

¹ 15 Jur. 1069.

Schofield v. Cahuac.

revoke every devise, matter, and thing contained in my said will in London which is, or may be construed to be variant from, or contrary to the above disposition, devise, or bequest of my said estates." The testator also appointed the said Alexander Wood and Robert Henderson executors in carrying the purposes of the codicil into effect in Canada. In 1806, the testator died in Canada, and Louis Gruaz and John Radcliffe proved the will in England, and Alexander Wood and Robert Henderson proved the codicil in Canada. John Radcliffe, who had always treated the property as his own, died in 1812, having by his will left all his estate and effects to his widow, Catherine Radcliffe, who proved his will. Catherine Radcliffe afterwards married a Mr. Cahuac. Gruaz, Wood, and Henderson were also dead. The present suit was instituted by some of the testator's nephews and nieces against Mrs. Cahuac, to obtain the accounts of Thomas Schofield's estate, and payment of what was due to the plaintiffs.

Russell and W. H. Bennet, for the plaintiffs.

J. Parker and H. Nichols, for the defendant.

The following cases were cited:—*Morley v. Renoldson*, 2 Hare, 570; *The Earl of Hardwicke v. Douglas*, 7 Cl. & Fin. 795; and *Lee v. Delane*, 14 Jur. 861.

Knight Bruce, V. C., gave judgment as follows:—In this case, the plaintiffs' counsel waived all claim to relief, except in respect to the testator's Canadian property and its produce, or surplus produce, which he directed by his codicil to be remitted to his nephew, John Radcliffe, under whom the defendant claimed; and as to that the questions are two—first, whether, according to the true construction of the codicil, read together with the will of the testator, that produce, or surplus produce, ought to be considered as given to John Radcliffe for his own benefit, subject or not subject to particular gifts contained in the will; and, secondly, whether, if not, the suit ought to be considered as instituted at too late a period—at a period too long after the plaintiffs' title had accrued—to render it fit for this court, whether there is or is not any statutory lien against their claim, to act in their favor. I have thought neither question free from difficulty, and my opinion has fluctuated in the former, if not in both; but having at last come to a conclusion against the plaintiffs upon the first question, I decline saying any thing now on the other. I do not think that, by the language of the codicil or otherwise, it is rendered necessary or reasonable to ascribe to the testator, when he made it, ignorance or forgetfulness of the substantial contents of his will, which had seemingly been carefully prepared, and was made less than four years before the codicil, although the latter was made, I assume, in Canada, when he had not the will before him, which was at the time in England. And although the codicil, if construed as I have concluded upon construing it, must probably be agreed to be accurately expressed, did the testator, who was survived by Louis Gruaz as well as by John

Burbidge v. Cotton.

Radcliffe, mean that John Radcliffe was to receive the surplus produce of the Canadian property merely as trustee for all the purposes expressed in the will? Upon consideration, I find myself unable to maintain that reading of the codicil. The consequence is, that, subject, perhaps, to particular gifts contained in the will, but not subject to the residuary disposition made by it, nor affected by that residuary disposition, the codicil must, in my opinion, be taken to give that surplus produce to him beneficially. I therefore dismiss the bill, but it is not a case for costs. The waiver which I have mentioned should be stated in the order. The plaintiffs waiving all relief, except in respect of the Canadian property and its produce, dismiss the bill, without costs.

BURBIDGE v. COTTON.¹

November 10, 11, and 19, 1851.

Friendly Societies — Usury.

The Frugal Investment Association was formed in 1845, and was certified under the 4 & 5 Will. 4, c. 40. Its objects were to advance the society's funds to its members, and to accumulate them, and to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, and the member offering the highest premium for it was entitled to that share, and as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken he was to pay the premium agreed upon, and also 8s. a month for 100 months (during which time only the society was to exist) as redemption money; and on these conditions he might have an immediate advance of 100*l.*, the full value of his share, on giving security for the repayment of it, together with such premium and redemption money. He was also entitled to participate in the general profits of the society. B. became a member, and obtained an advancement of five shares at premiums of 71*l.* for three, and 73*l.* for the other two; and he gave security as required, and received an advance of 500*l.* B. died, and on the society pressing for payment of the moneys so secured to them, B.'s executrix filed a bill against them, alleging that the transaction was usurious, and the society illegal, and claiming to redeem the security on repayment of the 500*l.*, with legal interest only:—

Held, on the authority of *Silver v. Barnes*, that the transaction, being between partners, was not usurious.

A SOCIETY, called "The Frugal Investment Association," was established in the year 1845. It assumed to be a friendly society, within the 4 & 5 Will. 4, c. 40; and on the 14th August, 1845, its rules were duly certified to be conformable to the provisions of that act, as was requisite for the creation of a friendly society. By these rules it appeared that the objects of the association were to accumulate the savings of its members, and to employ their funds in making advances to those members who required them. The society was to continue for a period of eight years and four months; its shares were not to exceed 2000 in number, and on its dissolution its property was to be divided among the members. The meetings were to be held

Burbidge v. Cotton.

monthly; the first took place on the 2nd September, 1845. Each member was to subscribe 1*l.* a month from the first month for every share he might hold, which would amount, of course, to 100*l.* per share at the end of the society's existence. Any member neglecting these payments was liable to certain fines. Members joining after the first meeting, or taking additional shares, or purchasing forfeited shares after that time, were to pay the amount of subscriptions thereon, calculated from the commencement of the association, and also such further sum as the directors should think fit, to represent the profits which might have accrued on such shares if originally taken. The society's funds were to consist of a "subscription fund" and a "dividend fund;" the former to comprise all subscriptions on the shares; the latter to include fees, fines, forfeitures, premiums, and all other receipts whatever; and out of this "dividend fund" all expenses and losses were to be paid, and the surplus was to be divided annually among all the members, whether borrowing members or not, excepting each year those members whose subscriptions were in arrear. At every meeting for the purpose of making advances to members of the value of their shares, the directors were to put up for competition one 100*l.* share at a reserved price, fixed by them, and the member who offered the highest premium for the immediate advance of such share was to be entitled thereto, and also to any number of additional shares, not exceeding twenty, at the same premium. Those members whose shares were advanced were said to "anticipate" them, and were required to give security for all future payments to become due upon the advanced shares. Such payments consisted of the premiums agreed to be given, which were to be liquidated by equal proportions monthly during all the future existence of the society, and also an additional 8*s.* per share per month, which was called "redemption money."

In the early part of February, 1846, Edward Burbidge, a solicitor, since deceased, being in want of money, applied to the agent of the Frugal Investment Association for an advance of 400*l.*, which advance the said association agreed to make, if the said Edward Burbidge could give any good security for the repayment thereof. Burbidge thereupon joined the society, and paid 5*s.* by way of entrance-money; and on shares being put up for competition, he obtained an advance of four, or 400*l.*, at a premium of 73*l.* for one such share, and 71*l.* for the remaining three; and it was agreed that the said Edward Burbidge, in consideration of the advance to him of such four shares, or 400*l.*, should secure to the association the repayment of 686*l.*, being the amount of the original advance, and the premiums agreed to be given in respect thereof as aforesaid, by equal monthly instalments, extending over the period of eight years, and also should secure the payment, during the said period of eight years, of the sum of 1*l.* 12*s.* per month, by way of interest upon the said sum of 400*l.*; and accordingly, at the time of entering into such agreement, Edward Burbidge assigned to the association two policies of assurance for 200*l.* and 300*l.* respectively effected upon his own life; and in April, 1846, the plaintiff, who was sister of the said Edward Burbidge, at his request executed an indenture of assignment of certain leasehold pro-

Burbidge v. Cotton.

perty belonging to her, for the residue of a term of twenty-one years therein, to the said Edward Burbidge, to enable him to give security for the said advance of 400*l.*; and by an indenture, dated the 17th April, 1846, in consideration of 400*l.*, Edward Burbidge assigned to the trustees of the said association the residue of the said term of twenty-one years, as a security for the repayment of such advance, and the monthly instalments and premiums aforesaid extending over the period of eight years, and also the payment for the same period of the sum of 1*l.* 12*s.* per month, by way of interest on the said sum of 400*l.*, under the name of "redemption money." In the month of July, 1846, Edward Burbidge obtained a further advance of 100*l.*, agreeing, as consideration for the same, to secure the repayment of 173*l.*, being the amount of such advance, and the said premium for the same, by equal monthly instalments, extending over the period of seven years and seven months, and also 8*s.* per month for the same period, by way of interest or "redemption money;" and to carry out such last-mentioned agreement, Edward Burbidge assigned another policy, effected on the life of the plaintiff for the sum of 150*l.*, and executed an indenture purporting to be a further charge upon the said leasehold premises. Edward Burbidge duly paid all the premiums on the said policies of assurance during his lifetime, and he also paid to the agents of the association several sums of money on account of the said monthly instalments and interest, amounting in the whole to the sum of 255*l.* 2*s.* 9*d.*

In May, 1848, the trustees of the association, alleging that the said Edward Burbidge had allowed his payments to fall into arrear, distrained upon the goods and chattels in and upon the said leasehold premises, for the sum of 102*l.* 18*s.* 3*d.*, as and for arrear of rent due to the said trustees. Edward Burbidge being unable to pay the said sum of 102*l.* 18*s.* 3*d.*, the trustees continued in possession of the said goods and chattels, and were in such possession at the time of the decease of the said Edward Burbidge, in June, 1848. By his last will and testament, dated in May, 1839, Edward Burbidge appointed the plaintiff his executrix, and in August, 1848, she duly proved his will. Under the pressure of the said distress, and in order to release the said goods and chattels, the plaintiff, in July, 1848, paid to the trustees of the association the said sum of 102*l.* 18*s.* 3*d.*; the trustees, shortly after the death of the said Edward Burbidge, also received the several sums of 200*l.* and 300*l.* secured by the policies effected on the life of the said Edward Burbidge; and they alleged that a balance of 153*l.* 9*s.* 10*d.* was then due to the society on the aforesaid securities.

Susannah Burbidge now filed her bill against the trustees, stating the above facts, and alleging that the said trustees having received on account of the said loans much more than the amount of the whole principal moneys advanced, and interest thereon after the rate of 5*l.* per cent., the plaintiff had applied to the said trustees to repay what they had so received exceeding the amount of such principal moneys and interest, and to reassign to the plaintiff the said leasehold premises and the said policy upon the life of the plaintiff. The bill

Burbidge v. Cotton.

then set out a correspondence which had taken place between the plaintiff's solicitor and the solicitor of the association, in which the latter stated that he was instructed to defend, on behalf of the trustees, any action or suit; and also that the association claimed, under and by virtue of the Friendly Societies Acts, and the mortgages to them from the late Mr. Burbidge, to be paid their demand in full as against the various properties so mortgaged, Edward Burbidge having been a member of the said association, and liable to its rules; and that an account was also furnished by the association, showing that there was then a balance of 153*l.* 9*s.* 10*d.* due from the estate of the said Edward Burbidge. The bill then charged that the sums of money contracted to be paid by the said Edward Burbidge, in respect of the advances made to him, greatly exceeded the amount of moneys actually advanced to him, together with interest on the said moneys after the rate of 5*l.* per cent. per annum; and that the said contracts and agreements, and securities from the said Edward Burbidge, were respectively shifts and contrivances devised to evade the law then and now in force against usury; and that the said association, called "The Frugal Investment Association," never was a friendly society, nor a society in any manner within the provisions of the 10 Geo. 4, the 4 & 5 Will. 4, or the 9 & 10 Vict., (the acts relating to friendly societies.) The bill further charged, that, as the members of the association were more than sixty in number, it was impossible, without the greatest inconvenience, to make them all parties to the suit; but that all the members had a common interest, which was represented by the trustees, the then defendants on the record. The bill prayed that an account might be taken of the moneys advanced to the said Edward Burbidge upon the said securities, and of all sums repaid to the society in respect of the same, and that the defendants might, in the event of such last-mentioned sums exceeding the amount of the moneys so actually advanced, together with interest after the rate of 5*l.* per cent., be ordered to repay to the plaintiff the amount of such excess, and to assign to the plaintiff the said leasehold premises and the said policy of assurance; and in the event of such last-mentioned sums being less than the amount of the moneys actually advanced to the said Edward Burbidge, together with interest after the rate of 5*l.* per cent. per annum, then, on payment of such deficiency, (which the plaintiff was willing and offered to make,) the defendants might be ordered to assign to the plaintiff the said leasehold premises and the said policy of assurance, or that the plaintiff might be at liberty to redeem the said premises; and that in the meantime the defendants might be restrained by injunction from bringing any ejectment against the plaintiff, or in any other manner depriving her of the possession of the rents and profits of the said premises, &c. The defendants, by their answer, stated that the association was formed, and constituted, and duly certified under the 4 & 5 Will. 4, c. 40; that the rules of the association were binding on its members, of whom the said Edward Burbidge was one; and then, after setting forth the rules of the association as above stated, they denied that the transaction was usurious, and alleged that all the members of the association were necessary parties to the suit.

Russell and Southgate, for the plaintiff, said that the question was, whether the plaintiff was entitled to redeem on payment of 5*l.* per cent., or something more than 20*l.* per cent. The transaction was usurious, being a charge on land; and the society, not being a benefit building society, was not within the exception introduced by the acts regulating building societies. This society purported to be within the 4 & 5 Will. 4, c. 40; but societies within that act may not be for any illegal purpose. *Reg. v. Scott*, 8 Jur. 473. This case was decided in 1844, before the formation of this society, and they must be supposed to have had knowledge of it. This society was a mere voluntary association for certain purposes of profit, not sanctioned by the law. By the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, all companies, (except banking companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies,) consisting of more than twenty-five members, were required to be completely registered before they would have a legal existence. This association consisted of 180 members, and ought to have been registered under that act; and as it had never been so registered, it therefore was an illegal society.

One ground of defence was, that this was a partnership, and that as the advances were made by members to another, there was no loan here within the meaning of the usury laws. It was also said, that the proportion of the profits which a member might receive might reduce the rate of interest paid for advances to 5*l.* per cent.; but that was not the fact here. In this association there were 2000 shares, which were transferable without the consent of each member or partner. In fact, it was an association, affecting to proceed under a color of legality, got up by a few rich persons for the purpose of enabling themselves to lend their money to needy members at a usurious rate of interest, and one which was incapable of entering into any contract; therefore, if there were any contract at all, it was a contract made by the three trustees on their own behalf. They must be considered as private persons lending money at a usurious rate of interest. *Silver v. Barnes*, 6 Bing. N. C. 180, would probably be cited on the other side, but it was not applicable, because this was not a partnership for any purpose whatever. All the members were not necessary parties to this suit; they were represented by the trustees; and as there were 180 shareholders, it would be impossible to make them all parties. The rule of the court was, that when all the members of an association had a common interest, they might be represented by one or two of their body. *Deeks v. Stanhope*, 14 Sim. 57; *Long v. Yonge*, 2 Sim. 369; *Wahworth v. Holt*, 4 My. & C. 619; *Richardson v. Hastings*, 7 Beav. 323; *Parsons v. Spooner*, 15 Law J. Rep. (N. S.) Ch. 155. The security in this case was void, as resting on rules which were illegal, and which, in fact, were a fraud on the act of parliament. The plaintiff had offered to pay the principal, with interest after the rate of 5*l.* per cent., even before the bill was filed. All these questions connected with building societies had been considered in the cases of *Dobbinson v. Hawks*, 16 Sim. 407; *Seagrave*

Burbidge v. Cotton.

v. Pope, 14 Law T. 524; *Mosley v. Baker*, 6 Hare, 87; *Cutbill v. Kingdom*, 1 Exch. 494; and *Reg. v. Phillips*, 8 Q. B. 745.

Bacon, Malins, and Prendergast, for the defendants. The bill sought relief on the ground that the society was an illegal one, and that the transactions in this case were mere contrivances to evade the usury laws. On these two points evidence had been produced. It must be taken that Mr. Burbidge knew the nature of the society which he was joining. The society was legal, for the transcript of its rules had been duly certified under the provisions of the 4 & 5 Will. 4, c. 40, which by the 14th section said, in reference to societies which had not conformed to the provisions of the 10 Geo. 4, c. 56, as follows:—"And whereas it is expedient further to extend the time for enrolment under the recited act, be it therefore enacted, that the provisions of the several acts repealed by the said recited act shall continue in force, as to all societies established under any or either of them before the passing of the said recited act, until they shall conform to the provisions of the said recited act as altered and amended by this act, any thing in the said recited act, or in the said act passed in the second year of his present majesty, to the contrary contained in anywise notwithstanding." The case of *Silver v. Barnes* had expressly decided the legality of the principle on which the association acted. The Joint-Stock Companies Act did not apply, for one of its provisions excluded friendly and loan societies duly certified and enrolled; and the rules of this association had been duly certified and enrolled under the act of Will. 4. Burbidge, during his lifetime, had received various dividends on his shares, and if these dividends had been continued, the amount of interest paid might not be usurious. It was said that the trustees represented the whole of the shareholders; but that was not so. One of the trustees had not anticipated his shares, and therefore he could not be said to represent those shareholders who had anticipated their shares by obtaining advances. The suit was in effect one to dissolve the company; all the shareholders ought, therefore, to be made parties.

Russell, in reply.

SIR J. PARKER, after stating the nature of the bill, and the question raised in the cause, said, the case of *Silver v. Barnes* was a direct authority that an advance out of the funds of an association of this kind, made pursuant to its rules, to one of its members, having in common with the other members an interest in the fund out of which the advance was made, and in the money to be repaid by him, was not a loan of money, but a dealing with the partnership fund, and was not usurious. He was not aware that the authority of that case had ever been doubted. It had been approved of by Parke, B., in *Cutbill v. Kingdom*, and he considered that a decision of a court of law on such a subject was binding in this court.

The plaintiff next contended that the transaction, if not actually usurious, was a mere shift and pretence to make a loan to Burbidge

Burbidge v. Cotton.

at usurious interest, under color of his being a member; that he was not *bonâ fide* a member when the transaction took place; and that the association itself consisted of a small number of persons of considerable property, who got up and joined it in order to be enabled to lend their moneys at usurious interest to persons in needy circumstances. Of this assertion there was no proof. Burbidge became a member on the 10th February, 1846, and he thenceforth became entitled to all the benefits and subject to all the liabilities of a member. At the same meeting he became entitled to anticipate his shares, and engaged to pay the premium named, but the transaction was not completed till some months afterwards. He doubtless became a member for no other purpose than to avail himself of the rules entitling members to an advance in anticipation of their shares; but if the object of these rules was lawful, his honor saw no reason why he should not do that. The only question appeared to be, whether Burbidge really had become a member, and this his honor thought was clear. It appeared to his honor, therefore, that the plaintiff was not entitled to relief on the ground of usury. The plaintiff then contended that the society was illegal, and that on that ground she was entitled to relief, independent of any thing usurious in the contract. The plaintiff contended that the society was not a friendly society, and that to make it a friendly society its objects must be among those contemplated by the act 4 & 5 Will. 4, c. 40, s. 2; and the plaintiff relied on this enactment as establishing that the association was not a friendly society; and she contended that if it were not a friendly society, it was a joint-stock company, within the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 11. The association was not registered pursuant to that act, and the plaintiff contended that it could not, therefore, lawfully carry on business, or enter into any valid contract.

His honor thought that this part of the plaintiff's case would have required great attention if the question of the legality or illegality of the society could be determined in this suit; but he did not think that that question arose in this suit, or that the court could properly express an opinion upon it. On the supposition that the association was illegal, it might reasonably be asked how that could entitle the plaintiff to the relief she asked. Her case was this — that her testator, with a number of other persons, became members of a society which was unlawful, and therefore she contended that her testator's contracts were voidable; but if so, every other member must have a similar right, and it could not be considered in justice that one member should have an advantage over the others by retiring from the society on the terms of being restored to his original position. The plaintiff had come into the court for relief on the ground that the society was unlawful; she was, therefore, bound so to frame her suit as to enable the court, if it interfered at all, to wind up the association in a manner consistent with the rights of all the members. This bill had no such object; and as regarded that part of the case, his honor thought it could not be sustained, and dismissed the bill, with costs.

Ex parte Tarrell.

**Re THE TRUSTEE RELIEF ACT — Re THE TRUSTS OF THE WILL OF
PIERRE JACQUES ANTOINE MASSELIN, Deceased — HARRISON v. MAS-
SELIN.¹**

November 25, 1851.

Practice.

Applications under the 10 & 11 Vict. c. 96, and the 12 & 13 Vict. c. 74, must be by petition, and not by motion.

Lewin, on behalf of the persons beneficially interested in a fund which had been paid into court in the above suit, moved, upon notice, that the Accountant-General might be ordered to transfer into his own name, in trust in the above-mentioned cause, certain sums of stock then standing in his name in trust "In the matter of the trusts of the will of Pierre Jacques Antoine Masselin;" and that another sum, consisting of dividends which had accrued due on the stock, and the further dividends to accrue, might be accumulated to an account to be called "The Income Account." *Lewin* said that there might be a question whether this application could be made by motion. The language of the 10 & 11 Vict. c. 96, was, that such orders as should seem fit should be from time to time made by the court "upon a petition, to be presented in a summary way, to the Lord Chancellor or the Master of the Rolls." The subsequent act of the 12 & 13 Vict. c. 74, also mentions applications by petition only.

PARKER, V. C., said he thought the application must be by petition, and that the act did not authorize an application of this kind by motion.

Ex parte TERRELL.²

November 13, 1851.

Winding up — Claim — Solicitor — Personal Liability.

A solicitor who had been employed in the formation of a company, and had been employed by the company after it had been formed, carried in before the master, to whom the winding up of the company was referred, his bill for the whole period during which he was employed. The Master allowed it as a claim: —

Held, that the court could not distinguish between that portion of the bill which related to business done before the company was formed, and the other; and the master's decision was not disturbed.

The solicitor had agreed that no director should be personally responsible, and that the officers of the company should not obtain payment until a sufficient sum should be obtained by the funds of the company: —

Held, nevertheless, that he could claim payment under the Winding-Up Act.

¹ 15 Jur. 1073; 21 Law J. Rep. (N. S.) Chanc. 53.

² 15 Jur. 1073.

Ex parte Terrell.

THE Independent Assurance Company was provisionally registered on the 13th February, 1847, and Mr. R. H. Terrell was registered as solicitor to the company. On the 13th May, 1847, a meeting was held, at which Mr. Terrell was present. A prospectus of the company was read, in which Mr. Terrell was named as solicitor; and it was resolved, amongst other things, "That the several officers named in the prospectus be appointed to the several offices to which their names were respectively attached, subject, nevertheless, to the forfeiture thereof." "That no director should be personally responsible for the salary of any of the officers of the company, and that no officer or officers of the said company should obtain payment for his services until a sufficient sum should be obtained by the funds of the company for that purpose; nevertheless, the first fund which should be formed by the payment of the deposit on the shares to be taken by the directors and others should be appropriated to the payment of the expenses of the formation of the company." At a subsequent meeting Mr. Terrell was called solicitor to the company, and instructions were given to him as such. The company was completely registered on the 29th October, 1848, the deed of settlement being dated the 24th August, 1848. On the 4th October, 1848, at a meeting of the directors, it was resolved, "That the sum of 60*l*. be paid to Mr. Terrell on account of stamps required for the deed of settlement prior to complete registration." On the 25th October, 1848, it was resolved, "That the provisional appointment of the following members of the board and officers be confirmed," Mr. Terrell being named as solicitor. In December, 1848, Mr. Terrell presented his bill, consisting of items relating to business done from and before the 13th February, 1847, and amounting to 581*l*. An order having been made for winding up the company, Mr. Terrell brought in his bill before the master, who allowed it as a claim, with liberty to Mr. Terrell to bring such action as he might be advised. Mr. Terrell now moved that this order might be discharged.

Malins and *W. H. Terrell*, in support of the motion, contended that Mr. Terrell's bill ought to have been allowed as a debt. Much of the business, though done before the formation of the company, was business which must be paid for out of the funds of the company, as the preparation of the deed. Mr. Terrell's appointment was recognized after the company was completely formed, and his debt, therefore, became a debt of the company. As to the resolution that the directors were not to be individually liable, that was not regarded in *Cope's case*, 1 Sim. N. S. 54; s. c. 1 Eng. Rep. 87.

Bethell and *Roxburgh* opposed, and cited *Ex parte Lloyd*, 1 Sim. N. S., 248; s. c. 3 Eng. Rep. 279; and *Pritchard's case*, not reported.

Malins, in reply.

Sir R. KINDERSLEY, V. C. It is very probable that under a different state of circumstances, I might come to a different decision; but

Ex parte Terrell.

it is impossible to distinguish the items in the bill, running down as it does from the year 1846 to the formation of the company, or to say how much of the bill prior to the 24th August, 1848, when the deed of settlement was executed, may come under the same ground of decision as the items subsequent. As a general principle, I may observe that I have not heard a word to raise a doubt why that portion of the bill at least which was incurred subsequent to the final formation of the company is not a debt of the company, except it is contended that that resolution prevents Mr. Terrell from having any claim except in the event of there being funds sufficient for payment. Now, it appears to me that the resolution of the 15th May, 1847, has no effect in preventing Mr. Terrell from being a creditor for the business he did subsequent to the formation of the company, inasmuch as at that time certain individual provisional committee-men and directors were engaged in trying to form a company, and for their own personal and individual security the resolution, to which Mr. Terrell was a party, was come to, that the directors were not personally liable, and that he could not say that A or B were personally liable, and that he could go against any one personally. But it never was intended but that if, in the course of business of the company, Mr. Terrell or another solicitor was employed to do the work of the company, the company were not to pay; the purpose was only to protect the directors from individual responsibility. Therefore, at least as to so much as is justly due with respect to business done subsequent to August, 1848, he is entitled to become a creditor of the company. A very different principle may be applicable to what Mr. Terrell did, not as solicitor to the company, but as solicitor to persons endeavoring to form a company. The principal distinction is clear: a person may incur great expenses in trying to form a company, and subsequently those persons forming the company may agree with the members of this company for the purpose of paying for this business, but the members of the company may never have dreamt of making themselves liable for perhaps an enormous amount of expenses incurred by the persons in forming the company. It is often stipulated in the deed of settlement, that the expenses so incurred shall be treated as expenses of the company; they then make themselves liable to such expenses; but without such a stipulation, or without something which, though not in the form of an express stipulation, amounts to the same thing, the members of the company, when formed, are not liable to the expenses incurred in endeavoring to form the company. Now, it does not appear to me that there is any sufficient evidence to satisfy me that there was any contract, or any thing in the nature of a contract, to make the shareholders liable to the preliminary expenses, nor am I satisfied that there are not matters upon which it may be held that there was such an implied contract. There is one peculiar circumstance here which deserves consideration, and that is the resolution to pay 60*l.* towards the purpose of defraying the cost of stamps or the deed of settlement. Another is, that after the resolution, after the company is formed, there was a confirmation of the provisional appointment which was made of Mr. Terrell at the meeting of May, 1847.

Mackenzie v. Mackenzie.

This and other circumstances may or may not be sufficient to make an implied contract on the part of the shareholders; and if I was now in a situation to distinguish between so much of the bill as I see no reason to doubt that the members are liable for, and that portion as to which I am not satisfied that they are liable, what I should do would be to direct that portion of the bill to which they are clearly liable to be sent for taxation, and the rest left to action. Not being able to do that, it appears to me that the master has done right in allowing the whole as a claim. I do not see how he could have said, "So much is debt, and the other portion claim." I do not know whether, when it is clear that several items were antecedent to the 24th August, 1848, which may come under the same category as the subsequent items, he could separate them. And though I have not the smallest doubt in my own mind that all that portion of the bill subsequent to the 24th August, 1848, is a debt due by the company, a debt which Mr. Terrell is entitled to claim and have paid to him in the course of this winding up, still I think I ought not to disturb the master's decision, but the whole shall be allowed as a claim, leaving Mr. Terrell at liberty to bring such action as he may be advised, for the purpose of trying whether he is entitled to recover the preliminary expenses. I have been trying to devise some form in which, without disturbing the form of the master's order, I might save the parties from having proceedings at law as to the whole bill. But it seems to me that the only purpose of the action would be, to try what was incurred prior to that debt. I am not able to devise such terms, and I think the master has adopted the simplest course in treating the whole as a claim. Not that I think there is any doubt as to what occurred subsequent to the 24th August, but because he could not distinguish. I think I ought not to make any order, but leave it as the master has determined. Costs of the official manager out of the estate; no other costs allowed.

MACKENZIE v. MACKENZIE.¹

March 28, August 1 and 2, and November 7, 1851.

Policies of Insurance — "Executors and Administrators" — Insolvency.

By a postnuptial settlement, in 1810, R. M. settled the moneys to become payable on three policies of insurance on his life, upon trust for B. M., his wife, for life; and after her decease, upon trust for his appointees; and in default of appointment, in trust for the children of the marriage; and he covenanted to keep up the policies. In 1821, R. M. appointed that, after the death of B. M., the moneys should be made over to *his executors and administrators*. By a subsequent order of this court, in 1821, the trustees were directed to sell the policies to the insurance office, and to bring the money into court to be invested, the dividends to accumulate during the joint lives of R. M. and B. M. In 1828, R. M. took

¹ 15 Jur. 1091.

Mackenzie v. Mackenzie.

the benefit of the Insolvent Debtors Act. In 1845, R. M. became bankrupt, and obtained his certificate. In 1847, B. M., the wife, died. In 1850 the children of the marriage presented a petition, praying that they, who were next of kin at the date of the appointment, might be declared entitled to the fund, and for payment, or that it might be accumulated till the death of R. M. An order was then pronounced, by the late Vice-Chancellor of England, in the latter alternative. The assignees in bankruptcy appealed from that order, and the assignee in insolvency, who had not been before the court, presented a petition to discharge that order, and for payment of the fund:—

Held, reversing the decision of the Vice-Chancellor, that the effect of the appointment was to make the property a part of the personal estate of R. M., subject to the life interest of B. M.; and that neither the next of kin of R. M. were designated by the appointment, nor were the executors or administrators to take beneficially.

Observations as to the nature of the interests which the children of the marriage took under the settlement, and the appointment.

THE facts of this case, together with the arguments and the cases referred to, are fully stated and commented on in the judgment.

Rolt, Campbell, Follett, Osborne, and H. Clark appeared for the several parties.

November 7. LORD CHANCELLOR. This case comes before the court on a petition of appeal from an order of the Vice-Chancellor of England, made on a petition presented by certain parties, being the children of Roderick and Barbara Mackenzie, who claim to be entitled to the proceeds derived from the sale of a certain policy of assurance upon the life of the said Roderick Mackenzie, under a deed, by which the said Roderick Mackenzie settled the said policy of assurance upon certain trusts hereafter mentioned, and by which order it was directed that the said proceeds should be invested as therein mentioned, the interest to accumulate till the death of the said Roderick Mackenzie, the settlor. Two petitions of appeal against that order are also before the court. The said Roderick Mackenzie obtained a discharge under the Insolvent Debtors Act, and the provisional assignee of that court has presented a petition of appeal against the said order, and by his petition prayed for the discharge of the above order, and for payment of the trust fund to himself. Roderick Mackenzie, after obtaining his discharge under the Insolvent Debtors Act, became bankrupt, and the assignees under the bankruptcy have also presented a petition of appeal. The original petition before mentioned, and the two petitions of appeal, were all heard before me, and now remain for judgment.

The material facts of the case are as follows. Roderick Mackenzie, the father, made a postnuptial settlement, in the year 1810, of the moneys to become payable under three policies of life insurance, upon trust for Barbara Mackenzie, his wife, for life; and after her decease, upon trust for his appointees; and in default of appointment, *in trust for the children of the marriage*; and he thereby covenanted to keep the policies on foot. In the year 1821, Roderick Mackenzie, the father, appointed by deed that the moneys so payable under the policies should, after the decease of the said Barbara Mackenzie, be made over to his executors and administrators. A suit was instituted for carrying into effect the trusts of the settlement, and (as expressly

Mackenzie v. Mackenzie.

stated by the Master) to preserve the rights and interests of all parties. By an order made in this suit, dated the 10th May, 1821, it was ordered that the trustees should relinquish the policies at such sums as might be obtained for the same from the insurance office, and that after certain payments the money to be obtained should be paid into the bank to the credit of the cause, and invested, and the dividends accumulated during the joint lives of the husband and wife. This order has been carried into effect. Barbara Mackenzie died in the year 1847, having had several children by the said Roderick Mackenzie, the father, some of whom are still living. In the year 1828, about seven years after the appointment, Roderick Mackenzie, the father, took the benefit of the Insolvent Debtors Act. In the year 1809 he became a bankrupt, and obtained his certificate, and his assignees renounced the policies before the date of the settlement. In the year 1845 he again became a bankrupt, and obtained his certificate. In March, 1850, the children presented a petition, praying that it might be declared that they, who were next of kin at the date of the appointment, were entitled to the fund in equal shares, and for payment accordingly, or otherwise that the fund might be accumulated till the death of their father. An order was made on this petition in April, 1850, whereby it was ordered that the fund should be accumulated till the death of the father. The assignees under the second bankruptcy appealed against this order, and the provisional assignee under the insolvency, not having been served with the petition of the children, presented another petition, praying that the last-mentioned order might be discharged, and for payment of the fund to himself as such provisional assignee; and this petition came on for hearing before me, together with the appeal of the assignees in bankruptcy.

Upon the circumstances which I have stated four questions arise: first, whether the next of kin are designated by the appointment; or, secondly, whether this is an appointment to the executors or administrators beneficially; or, thirdly, whether the effect of the appointment is to make this property a part of the personal estate of the husband; and, fourthly, (if the last is the true view,) whether the property passes presently to the husband's assignees. I am of opinion that the next of kin of the husband are not designated by the appointment, nor are the executors or administrators to take beneficially, but that the effect of the appointment is to make this property a part of the personal estate of the husband. The authorities fully establish that the effect of a settlement by deed, limiting property to the executor or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under the Statutes of Distribution. The authorities to that effect are *The Attorney-General v. Malkin*, 2 Ph. 64; *Daniel v. Dudley*, 1 Ph. 1; *Hames v. Hames*, 2 Kee. 646; *Palin v. Hills*, 1 My. & K. 470; *Collier v. Squire*, 3 Russ. 467; and *Halloway v. Clarkson*, 2 Hare, 521; and the case of *Halloway v. Clarkson* further shows that the settlor, in such cases, has a present control over the property settled for his own benefit, or, in other words, the settlor has as unlimited a power of disposition as he had before the settlement.

Mackenzie v. Mackenzie.

It is true that in *Palin v. Hills*, 1 My. & K. 470, and *Bulmer v. Jay*, 3 My. & K. 200, the words "executors and administrators" have been held to designate the next of kin; but the decision in these cases depended on special circumstances, which clearly do not resemble the circumstances of the present case. It is true also, that in other cases, such as *Sanders v. Franks*, 2 Mad. 154, the executors or administrators have been held to take beneficially; but it was so held by force of the words "for their own use and benefit," which do not occur here. The natural meaning of the words, "a gift to the executors or administrators," does not import a gift to the next of kin, even indirectly through the medium of the executors or administrators; and there is commonly a far greater probability, that when a person limits property to his own executors and administrators, he means it to form a part of, and to follow the destination of, his personal estate, than to be given absolutely to his next of kin; for the usual purposes accomplished by giving it to his next of kin are accomplished by causing it to form part of his general personal estate, in case he does not afterwards choose expressly to give it away from the next of kin; and at the same time, if he adopts a mode of limitation by which he causes it to form part of his general personal estate, he thereby reserves to himself that power of giving it to whomsoever he chooses which it is natural for him to wish to possess. There is, indeed, one purpose not answered by the limitation, which makes the property part of his personal estate, which is effected by a limitation in a deed to the next of kin, and that is to secure the property to his next of kin against subsequent creditors. But that is not an honest purpose, and therefore not an object to be implied, or to be conjecturally imputed.

Again: as it has been observed in another case, it is extremely improbable that a person should give his property to his administrator beneficially, when it is unknown and uncertain who may claim to be his administrator, and who might be a small creditor. The words naturally import, and the presumable intention in such cases is, that the property should go to the executors or administrators, to be applied by them as part of the general personal estate under the will or the Statutes of Distribution, as the case may be, subject, of course, to payment of debts; and as this property forms part of the husband's personal estate, so it appears clear that it passes to his assignees. In deference, however, to the decision of the court below, I have thought it advisable to consider on what grounds the claim of the assignees could have been allowed to be obstructed. The assignees would have been entitled to the fund in question if it had been the identical fund settled, and the settlor had afterwards appointed, instead of the fund being a substitution for moneys which would have been payable at the settlor's death under policies of assurance: for it appears from *Holloway v. Clarkson*, that in that case the settlor, after the death of the wife, might have required immediate payment to be made to himself.

As the case stands, however, it has been contended that the court cannot determine to whom the fund belongs till the death of the settlor, the time when the money would have been receivable if the covenant in the settlement had been fulfilled by keeping up the poli-

Mackenzie v. Mackenzie.

cies. As regards the children, I think they must be placed in a position, in relation to this fund, as nearly approaching their position with regard to the original fund as may be. This might be very important to them, as it is possible, that, before the death of the settlor, he might pay all his creditors in full, and in that case the children might become entitled to the fund, as they might have been entitled to the original fund. It is proper, therefore, to consider what would have been the position of the children, even as regards the original fund. The policies might, after the appointment, have been sold by the settlor as part of his personal estate, and what he might sell the assignees would be enabled to claim. The children have no interest entitling them to resist the claim of the assignees. In the first place, the children have no such interest under the limitation to them in default of appointment. They never had a vested interest under that limitation, inasmuch as the very subject of the settlement was necessarily a thing only existing inchoately, and even the executory interest which they took under the limitation in default of appointment was annihilated by the appointment. Nor have the children such an interest as I have before mentioned as next of kin of the settlor, irrespective of any limitation in the settlement. Regarded in this light, their claim as next of kin is a mere hope or chance of succession. In this respect they have only a possibility, or less than what is technically termed a legal possibility, of an interest derivable through their father, and not an interest capable of being set up as an independent interest. Nor have they an interest as next of kin under the settlement by means of the appointment itself.

It may be urged, indeed, that the effect of the appointment, as regards the destination of the property, is to give the original fund to such person or persons as shall be entitled to the settlor's personal estate at his death, either under his will or under the Statutes of Distribution, as the case may be: that the children are of the class so contingently entitled: that they have an interest under a limitation, as opposed to that mere hope or chance of succession which they have as next of kin in respect of the general personalty of their father, independent of any limitation: that the subject of that hope or chance has only an ideal potential existence; for whether the father will have any general personalty at the time of his death is a matter of perfect uncertainty, and no act is done to secure the existence of such personalty, nor is any act done to confer upon them an interest in such personalty, even if it should exist. But it may be said, that the original fund in question has an actual though only an inchoate existence, and not a mere ideal potential existence: that an act has been done to secure its existence: that it inchoately exists as a fund tied up till his death, and then, at least, if the policies are not before vacated, the fund will certainly form part of his personal estate by virtue of an express limitation, and the children will take if they survive, unless the property shall by will be given away from them: that though they have no vested interest, yet their interest is as certain to take effect in possession as that of the appointees under a revocable deed, except so far as the liability to the debts of the intestate is concerned, a lia-

Price v. Griffith.

bility which does not prevent a legatee from having even a vested interest, and therefore cannot prevent the next of kin, in a case of this kind, from taking an interest: and that, in such cases, the children, long before the existence of the claim of creditors, may have ventured to marry and have founded families in dependence upon an interest like this.

These arguments, however, do not, nor does any other which has been suggested, or which occurs to me, show that the children take any interest, technically and properly speaking, under the appointment. The fact is, that the effect of the appointment is to add the money to the husband's estate, in the first instance, in the hands of his executors or administrators; and when in the hands of his executors or administrators, it then becomes subject to the operation of any testamentary disposition of it, or, in default of that, to the operation of the statutes of distribution. The persons who take it beneficially do not take as purchasers under the instrument, but the property becomes added to his personal estate. They are not, like the objects of limitation, particularly designated by that instrument. They have only the hope or chance, whatever it may amount to, of becoming entitled to the property, or some part of it, not under that instrument, but under the will or intestacy, as the case may be. The children, then, having no interest, properly speaking, under the settlement or the appointment, the husband, after the death of the wife, could have sold the policy to the insurance office, or the assignees might have sold it, and would have been entitled to the proceeds. But, in fact, it has been sold, and consequently they are entitled to the fund which has arisen from the sale who are now entitled to the settlor's interest. The order of the Vice-Chancellor must, therefore, be discharged, with costs, and the fund must be carried over to the account of the estate of Roderick Mackenzie, with liberty to apply. I cannot at present make any order for payment of the fund to either the insolvent assignee or the assignees in bankruptcy; it must be carried over, subject to the further order of the court. I think the case was not conducted with *bona fides*, for it might have been disposed of without the court having ever known any thing about the insolvency of Roderick Mackenzie but for the second petition.

PRICE v. GRIFFITH.¹

November 24, and 25, 1851.

Specific Performance — Ambiguous Agreement — Undivided Moiety.

A contract for a lease of "Coals, &c.," or "Minerals," is too ambiguous to be carried out by this court.

Price v. Griffith.

A contract by the owner of one undivided moiety of a colliery, for a lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specially carried out as to his own moiety, either with or without compensation.

Semble, in such a case the parties will be left to damages at law.

THIS was an appeal from Wigram, V. C., (judgment delivered February 6, 1850, not reported,) dismissing with costs the plaintiff's bill for a specific performance of an alleged agreement. The facts were, that Griffith and Jenkins were seized, as tenants in common in fee, in undivided moieties of certain mines and beds of coal, ironstone, fireclay, and other minerals, beneath the farms of Lletty Brongy and Gelly Eblig; and in 1842, David Rees was employed in exploring the minerals with a view to their being let on lease, or to their being worked by Griffith himself. In this state of things Griffith wrote and sent to Rees a letter, which was produced and marked C, and was in the following terms:—

“April 15, 1843.

“Dear Sir,—As to the coal at Lletty Brongy, I beg to say, that I am still of the same mind as to the letting, and to you as the lessee, on the terms we advanced, and which we both coincided in, which terms are stated in the agreement in Mr. Cuthbertson's hands, and the term to commence from May next.

“I am, dear Sir,

“Very truly yours,

“T. A. D. GRIFFITH.”

The interest, whatever it was, which Rees thus acquired, he assigned to the present plaintiff, Sir Robert Price. There was a dispute as to the document referred to in the above letter as “the agreement in Mr. Cuthbertson's hands;” the plaintiff insisting that it was a document produced as an exhibit marked A which was so referred to, the terms of which, as the judgment was based on the ambiguity of the document as one of the grounds, we subjoin.

Exhibit marked A.

“Terms proposed by Mr. David Rees for letting and taking of coals, &c., at L. and B. Lessors to grant term of ninety-nine years, to commence from 1st May, 1843. If worked as a county colliery, without a road, rent to be 20*l*. per annum. If used for exportation or manufactories, or if sold to manufacturers, rent to be 100*l*. per annum, with stated royalty. Royalty to be 6*d*. per ton on all minerals. If minerals from other lands than the said farms be carried over the said farms, rent to be 100*l*. per annum, whether the minerals on the said farms are worked or not. Lessees to have the power of discontinuing the said lease by twelve months' notice, such notice to commence and be given on the first day of some May ensuing. That lessees shall supply lessors, and all tenants of lessors on the site of working, with coal for their purposes, and for the purposes of the land they shall hold of the said lessors, free of all expense, save and except the expense of working the said coal.”

Price v. Griffith.

There were other clauses as to the powers of felling timber, making roads, &c.; but no ambiguities seemed to present themselves to the minds of their Lordships on any other parts of the document A, except the parts above set out. The defendant, Griffith, insisted by his answer, and it was in fact proved, that this document A was delivered to Cuthbertson, not by Griffith, but by Rees himself, and returned to Rees by Cuthbertson, who was the family solicitor of Jenkins, and usually employed by Griffith, though he occasionally employed another adviser. It will be observed that the letter of the 15th April, 1843, above quoted, includes, in terms only, the "coal at Lletty Brongy;" whereas the document A extends to the coal, &c., not under Lletty Brongy only, but also under Gelly Eblig. There was another document, at that time in Mr. Cuthbertson's hands, also produced as an exhibit, and marked Z, which likewise answered the general description, in the letter, of an agreement, or rather minutes of a proposal, for a lease of the coals and other minerals, the terms of which differed in some respects from the terms in paper A, chiefly in that it included the coals and minerals under Lletty Brongy only. To explain this difference it was stated that all the coal was called "Lletty Brongy coal;" but of this there was no evidence. The plaintiff, Sir Robert Price, being unable, after a long correspondence, to obtain a lease under this alleged contract, filed the present bill. It was alleged, and not denied, that since the date of the letter in question a very valuable seam of iron (known as the "Blackband") had been discovered under the lands in question; but, except so far as such an allegation might insinuate an undue desire in the defendant to start from his agreement, there was no charge of fraud or collusion between Griffith and Jenkins, or at all. Wigram, V. C., dismissed the bill, with costs, on the ground that there was no evidence to prove that paper A was the document referred to in Griffith's letter to Rees of the 15th April, 1843, or to show what that document was. From this decree the plaintiff now appealed.

Rolt and Hislop Clarke, for the appellant. There is an attempt to perplex the case by producing various exhibits of agreements and proposals, many of them copies of each other, which may at once be set aside. Cuthbertson, who was the family solicitor of both Griffith and Jenkins, actually prepared a draft-lease from Griffith and Jenkins to Rees, in conformity with the exhibit A, which was the document referred to in the letter of the 15th April, 1843.

KNIGHT BRUCE, L. J. There is no evidence that Jenkins ever signed any agreement to demise these mines. The contract, if any appears to have been entered into by Griffith alone, the owner of one undivided moiety. Can we decree a specific performance of such an agreement? In *Nelthorpe v. Holgate*, 1 Coll. 203, which was before me, there was tenant for life and remainder-man. The remainder-man contracted to sell the fee, but the tenant for life refused to concur. I thought there was evidence that the tenant for life so refused at the instigation of the remainder-man, and I decreed a specific performance,

Price v. Griffith.

with a compensation for the life interest, which could not be got in. Here you have a contract by Griffith for a lease of the whole colliery, he having only an undivided moiety. He may have honestly thought that Miss Jenkins would accede to the contract. How can you have a lease of an undivided moiety? Is not this a case for an action, if you are damaged? Mr. Palmer, what is the theory on the part of Griffith, assuming, for the sake of argument, that the contract was entered into?

J. Hinde Palmer, for the respondent, Griffith. If Griffith had entered into a contract, he, perhaps, might have expected Miss Jenkins would join in it.

KNIGHT BRUCE, L. J. Then there are various stipulations, as to timber, roads, &c., which must be most materially modified. The view does not appear to have been taken by either side, whether, admitting this agreement to have been entered into, it is not an agreement which cannot usefully be carried out, and of which, therefore, a court of equity will not decree a specific performance.

Roll, in continuation. But he puts his case on this, that he never entered into any agreement: he does not rely upon its being an unreasonable arrangement. If he had admitted the agreement, we might have had an opportunity of giving evidence against the view now put forward, and might perhaps have shown such a state of things as were shown in *Nelthorpe v. Holgate*.

KNIGHT BRUCE, L. J. If a lease be granted by both lessors, there would be no impediment to the exercise of all the powers and provisions which might be inserted in the lease. But if a lease be made by the owner of one undivided moiety, then impediments may arise which will really and materially interfere with the rights and enjoyment of the non-leasing tenant in common, as well as of the lessee. It is an importantly different transaction.

Roll referred to *Mortlock v. Buller*, 10 Ves. 292. At all events, the bill ought not to have been dismissed, with costs.

KNIGHT BRUCE, L. J. What is the meaning of this document A, supposing it to be the document in question? What is the meaning of "coals, &c.?" What are the "minerals" here spoken of? The obligation to provide coals for the lessors and their tenants on the site of the colliery seems very indefinite and ambiguous.

Roll. "Coals, &c.," means all minerals—coals, iron, stone, fire-clay—every thing. All the terms in this agreement are quite intelligible to persons of local experience.

W. Hslop Clarke with *Roll*.

Malins and J. Hinde Palmer, for the respondent, were not called on.

Knight Bruce, L. J. The first question here is, whether the documents A and C, (the letter of April 15, 1843,) taken together, comprise a perfect agreement, capable of being carried out by a decree of this court for specific performance. To the affirmative of that proposition there are several objections. In the first place, I am not satisfied, speaking for myself alone, that the subject-matter of the contract is sufficiently stated. I am not satisfied what it was which was intended to be included in the term "coals, &c." There is no evidence to show—and perhaps such evidence would be difficult to get—what this " &c." includes, or what it does not include. In the next place, I am not satisfied that the other terms of the alleged agreement are completely intelligible, or such as could be compelled to be carried into execution. But, assuming that papers A and C comprise all that is necessary for constituting a binding contract, the question remains, are they to be acceded to, inasmuch as they are not signed, but only proposed to David Rees as the conditions upon which the coal-mines were to be let? The absence of a signed agreement was endeavored to be overcome by the letter C. [His Lordship read the letter of the 15th April, 1843, already set out, remarking that it only referred to the coal at one of the two places named in paper A.] The "agreement" referred to in the letter is alleged to be the document marked A, which, I may remark, is no agreement at all. However, it might perhaps be too strict criticism to decide on the absence of identity merely on such grounds. It is a more important observation, that there were two papers (A and Z) in Mr. Cuthbertson's office, each of which might, with equal propriety, if with propriety at all, answer the description in this letter. It is, therefore, unnecessary further to examine what is the meaning of the paper marked A, since we cannot assume that it was the document referred to as "the agreement in Mr. Cuthbertson's hands," because of the uncertainty thus introduced.

It becomes also unnecessary to consider the question arising under the Statute of Frauds. I may, however, observe, that the benefit of the statute is claimed by the answer; and there was no part performance to take the case out of the statute, since the possession, such as it was, of Rees, in 1842-43, was prior to and independent of the agreement now attempted to be set up. But this is not the whole case against the plaintiff. This colliery belongs to two persons, in undivided moieties. The plaintiff filed his bill against them both, alleging that the contract was binding against both; but by an alternative prayer he prayed relief against one, if he should fail to establish his claim against the two. The bill was afterwards dismissed against Mary Jenkins, leaving only the owner of the other share. But the owner of the other share never meant to contract for one share alone; if he intended to contract at all, he intended to contract for a lease of the whole colliery. I can conceive cases where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without making

 White v. Smith.

compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. A lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery; and here there is no ground of impropriety or misrepresentation, as by holding himself out as capable of contracting for the whole, or in fact any other ground for enabling the court to act against the owner of one undivided share. The question remains as to the costs of this appeal; and complaints have been made of the defence. There are numerous cases in which, the plaintiff's case failing, it does not fail with all costs; but there the course of the plaintiff ought to be clear. Here there is no case whatever against the defendant; and the plaintiff cannot complain if a defendant, who ought never to have been summoned, defend himself in more ways than one. There is nothing here for dividing or giving less than the whole costs. There was never any pretence for filing the bill at all.

LORD CRANWORTH, L. J. I am of the same opinion. The Vice-Chancellor seems to have gone on the ground that there was no agreement capable of being enforced. The agreement relied on is, in two respects, deficient. I am not satisfied what that paper is which is referred to in the letter of the 15th April, 1843, as "the agreement in Mr. Cuthbertson's hands;" and if the document A be that paper, I am of opinion that the terms of it are too ambiguous for this court to carry out. The appeal must be dismissed, with costs.

 WHITE v. SMITH.¹

July 24, 1851.

Will—Devise of Real Estate upon Trust to be sold—Devisee takes as Personalty.

In 1822, a testator, by his will of that date, devised his real estate to trustees, upon trust, after the decease of his wife, to receive the rents during the life of his son, M., and to apply the same for his benefit during his life; and from and immediately after the decease of his said son, upon trust to sell, and the net proceeds of such sale he directed to be applied "in manner hereinafter mentioned." If it should be more to the interest of his estate that the said estates, or any part thereof, should be demised during his son's life, then the testator directed the trustees to demise the same during his said son's life. Then, after bequeathing certain legacies, the testator directed the said trustees to invest all moneys due to him, and all other his moneys, and to apply the income of his capital stock or fund for the maintenance of his said son's children, and, on their severally attaining twenty-one, to pay, assign, transfer, and "convey the aforesaid capital stock or fund, estate, and effects" to such children; and in case they should all die under age, and without leaving issue, upon the further trusts therein mentioned. The testator died in 1824. His widow died in 1834. M., the son, died in 1850, a bachelor:—

Held, that the trust for sale was absolute, and the property must be considered as personalty, and the son of the testator, in the events that had happened, took it as personalty, if he took it at all, as heir of the testator.

¹ 15 Jur. 1096.

White v. Smith.

But quære, whether the gift over on failure of issue of the son did not take effect; and quære also whether any beneficial interest in the produce of the real estate was given by the will after the death of the son?

A QUESTION arose in this case on the construction of the following will:—The will of Moses Banks, dated the 24th June, 1822, after making certain specific devises and bequests, proceeded as follows:—“I give and devise my said freehold estates, and the fee-simple and inheritance thereof, unto my friends Mr. George Osborne and Mr. Thomas Caldwell, and their heirs, upon this special trust and confidence, nevertheless, that they, my said trustees, do and shall, from and after the decease of my said wife, receive the rents, issues, and profits during the natural life of my dear son, Moses Banks, and pay over or otherwise apply the same unto and for the benefit of my said son during the term of his natural life, as the same shall become from time to time due and payable, and not by way of anticipation; or otherwise permit my son to occupy the same premises, or any part thereof, during his freewill and pleasure; and from and immediately after the decease of my said son, upon further trust that they, my said trustees, do and shall make sale or dispose of the said estates, and the fee-simple thereof respectively, either by public sale or private contract, and in one or more lots, as shall to my said trustees appear respectively to be most expedient, and the net proceeds to arise by such sale I direct to be applied and disposed of by my said trustees in manner hereinafter mentioned; and if it shall be more to the interest of my estate that the said freehold estates, or any part thereof, should be demised by lease during my son's natural life, and he shall not choose to reside in or occupy the same, then I hereby direct my said trustees to demise in the usual way the said premises, or any part thereof, during my said son's life, so as that the lessee covenants to repair, and the best yearly rent to be reserved.” Then followed the usual receipt clause; and after bequeathing certain pecuniary legacies, the testator directed the investment of all moneys due to him, and all other his moneys, in the public funds or on government securities. The testator directed the trustees of his will, after the decease of his said son, to apply the income from the testator's capital stock, or fund for the maintenance of his son's children, and, upon their severally attaining their ages of twenty-one years, to pay, assign, transfer, and “convey the aforesaid capital stock or fund, estate, and effects” to such children; and in case all his son's children should die under age, and without leaving issue, upon the further trusts thereafter mentioned. The testator died in 1824, and his widow died in 1834. Moses the son died in 1850, without ever having been married. The real estate had not been sold, and the question was as to the beneficial title to the real estate.

W. M. James, for the plaintiff.

J. Parker, Collins, W. Taylor, and Fane, for the defendants.

The cases cited were—*Smith v. Claxton*, 4 Mad. 484; *Davenport*

Bligh v. Tredgett.

v. *Coltman*, 12 Sim. 610; *Fitch v. Weber*, 6 Hare, 145; and *Sewell v. Denny*, 10 Beav. 315.

KNIGHT BRUCE, V. C., said that it might possibly be a question whether, even in the events which had happened, the beneficial interest in the produce of the real estate was not given by the will; and also whether, even if the testator's son had left issue, the beneficial interest would have been given by the will. His honor, however, thought it unnecessary to decide either of those questions. The effect of the will was to give the real estate to the testator's wife for life, remainder to his son for life, and then "upon further trust," &c. [See above.] The trust for sale was absolute and unconditional. That disposition, subject to the life interests of the wife and the son, converted the estate into personalty. It was competent to the son, during his life, to say, "If I do not leave issue, there shall not be a sale." He had not said this. His honor's opinion was, that if the son took any thing as heir, he took it as personalty; the question then was between his real and personal representatives.

W. M. James requested his honor to decide this question without argument.

KNIGHT BRUCE, V. C., wished rather that the parties should arrange the distribution between themselves, as he thought the meaning of the words "in manner hereinafter mentioned" very doubtful.

A decree was accordingly made by arrangement.

BLIGH v. TREDGETT.¹

November 17, and 25, 1851.

Practice — Next Friend — Costs.

A bill was filed by a married woman concerning her separate property, in the name of a next friend, who had died two days before the bill was filed. About fifteen months afterwards her solicitor substituted B. as her next friend, without his knowledge. A year later the bill was dismissed for want of prosecution, and costs. Notice of this motion to dismiss the bill was served on the plaintiff's agent, and by him sent by post to B., but not in time to enable him to appear on the motion. This was the first intimation that B. received of the existence of the suit. The solicitor of the married woman had become insolvent, and had absconded to America. B. moved, without serving the solicitor personally, or by substitution, with notice of the motion, to vary the order dismissing the bill with costs, by ordering that the solicitor should pay the costs. This motion was refused, with costs.

A next friend, substituted for one who has previously died, is liable for all the costs from the commencement of the suit, and not only for such as have been incurred during the time his name has been on the record.

Semble, a next friend, appointed without his own knowledge, is liable, as between himself and the defendants, to all the costs of the suit, and has a remedy against the solicitor who appointed him.

Bligh v. Tredgett.

THIS was a motion, on behalf of the next friend of the plaintiff, a married woman, to dismiss the bill, and to make the solicitor who filed it pay the costs of the suit. In the early part of the present term some of the defendants in the suit had obtained an order to dismiss the bill, with costs, for want of prosecution. This order had not been drawn up, and it was now sought to vary it as above stated, by making the solicitor pay these costs. The bill was by a married woman suing in the name of Baker as her next friend, concerning her separate estate. The solicitor had named Baker as next friend without his authority or knowledge, in the place of a former next friend, who had died on the 7th May, 1849, two days before the bill was filed. Baker's name was not upon the record, however, until August, 1850. The first intimation that Baker had of the suit was a notice of the motion for an order to dismiss the bill, with costs. This notice was served on the plaintiff's agent, and by him sent by post to Baker, who was then in the country. Baker did not receive it in time to appear when the motion came on, and in his absence the bill was dismissed, with costs, which Baker of course was liable to pay. The solicitor of the plaintiff, who named Baker as next friend, had become insolvent, and had absconded to America. He had not been served personally, or by substitution, with notice of this motion.

Karslake, for the motion, said that the order dismissing the bill had been irregularly obtained; the next friend should have been served personally with notice of the motion to dismiss the bill, and should have had an opportunity of appearing personally. *Tarbutck v. Woodcock*, 6 Beav. 581. The agent only of the married woman, the plaintiff, had been served.

[Sir J. PARKER, V. C. The order dismissing the bill is a regular order.]

He asked that the order should be discharged or varied as to the payment of costs, or that the next friend should be indemnified by the solicitor.

[Sir J. PARKER, V. C. If you ask that the solicitor should pay the costs, you should have served him; that you have not done. You must obtain an order for substituted service on his agent, and this motion must stand over.]

The next friend is entitled to be served personally before that order is drawn up.

[Sir J. PARKER, V. C. If the order is an order at all, it is as good as it can be made.]

The next friend ought not to be made to pay costs, as he cannot recover them from the solicitor, who has absconded. *Ward v. Ward*, 6 Beav. 251; *Wade v. Stanley*, 1 J. & W. 674; *Hood v. Phillips*, 6 Beav. 176; *Tabbemor v. Tabbemor*, 2 Kee. 679; *Barlee v. Barlee*, 1 Sim. & S. 100.

[Sir J. PARKER, V. C. The next friend is not relieved from payment of the costs in that case; he only loses his remedy against the solicitor who named him. (His honor referred to *Dundas v. Dutens*, 1 Ves. jun. 196.)]

Bligh v. Tredgett.

A harder case could scarcely be imagined than that a man's name should be thus used without his knowledge, and that he should be exposed to an indefinite liability, which he has no means in the world of preventing or evading.

C. Hall and *Bates*, for the defendants, said that the law was clear in the cases cited, that the next friend must pay the costs, and have his remedy over against the solicitor.

Karslake, in reply, said that the rule seemed extraordinary and unintelligible, but he must admit that the cases seemed to lay down that rule. However, he insisted that he was entitled to have the order varied, to the extent of limiting the liability of Baker to the period during which his name had been on the record. The separate estate of the married woman, who was the real plaintiff, should be made liable for these costs. The suit being with her privity, she was more properly liable than this next friend to pay the costs of it.

Sir J. PARKER, V. C., said the practice of the court was quite clear, and there was no reason why Mr. Baker should be relieved from his liability as between him and the defendants. The cases which had been referred to went to this length—that though the solicitor had improperly used the name, and though he was liable to indemnify the person whose name he had made use of, yet that circumstance did not interfere with the right of the defendants to look to the next friend for payment of costs. In the case of *Dundas v. Dutens*, Sir Thomas Dundas made an affidavit that his name had been inserted without his authority; and the Lord Chancellor (Lord Thurlow) said, “If a man will do such a thing as this in a court of justice, and bring a person's name on the record without any authority; and if it is intended, as in this case, with a combination to bring him and Callender forward to cheat the children, I ought not to permit the children, or the estate, or any one, to receive any damage.” Mr. Mansfield, for Sir Thomas Dundas, insisted, “that as his name was used without his authority, he was not to pay the defendant's costs; but his name ought to be struck out, which, he said, would be immediately done at law, and compared it to the case of forging a name.” Lord Chancellor—“I doubt whether it would be so at law, and whether I can deliver him from the costs to be taxed against the plaintiffs. I cannot deprive the defendants of their right; they are entitled to this judgment. The defendants must have their remedy against the plaintiffs, and this plaintiff against him who pretended to be his agent. If a man's name stands upon the record down to the hearing, which I can hardly conceive, without his knowing it, he must pay costs, if the bill is dismissed with costs. The case of forging a name is not parallel; it is different from that of a name standing on the record. At law there would be a remedy upon the record for the costs, and the court would act according to their discretion.” Under these circumstances his honor was of opinion that he could not relieve the next friend from the liability which the order imposed

Bligh v. Tredgett.

on him to pay the costs. The next point made was, that he was appointed next friend at a period subsequent to the institution of the suit, and that he was not liable for the costs incurred before that time. There was, however, no authority to show that it was the practice of the court to sever such costs, and his notion was, that a party, on becoming next friend, became also liable to pay all the costs that had been incurred previously. He could, therefore, grant him no relief in this respect, and he was afraid that the next friend must pay the additional costs of bringing these defendants, on this motion, before the court. Then it was said that the plaintiff was a married woman, with a separate estate; but his honor had no materials before him to enable him to make an order with respect to her. The solicitor was undoubtedly liable, but as he had gone to America, an order for him to pay would be useless. The motion must be refused, with costs.

His Honor gave leave to mention the case again, if any authority could be found for limiting the liability of the next friend to the period during which his name was on the record.

November 25. *Karslake* again mentioned the case, contending that the liability of the next friend to costs must be confined to the period during which his name had been on the record; or, at least, that he ought not to pay the costs incurred in the time of the preceding next friend. He cited *Lady Lawley v. Halpen*, Bunb. 310, in which, on motion by a married woman to change her next friend, the court hesitated, doubting whether the new next friend would be liable for the costs of the former one; but at last they ordered that a new next friend should be named, he entering into a recognizance to answer the costs. In *Davenport v. Davenport*, 1 Sim. & S. 101, the first next friend, on another being substituted for him, was required to give security for the costs to that time.

[Sir J. PARKER, V. C. There is a material difference between the change and death of a next friend.]

The difference is in my favor; in the case of the death of a next friend, there is no one liable. *Morgan v. Crompton*, Bunb. 332; *Turner v. Turner*, Strange, 708. The costs were lost in this case at the time when the new next friend was appointed.

C. Hall and *Bates*, for the defendants, referred to *Howard v. Prince*, 14 Beav. 28, note, s. c. 7 Eng. Rep. 215; *Melling v. Melling*, 4 Mad. 261; and *Harrison v. Harrison*, 5 Beav. 130.

Sir J. PARKER, V. C., said that there must be a settled rule of practice in these cases. He had always been of opinion, that the court, on a change of next friends, did not apportion the costs between them. He said it was an analogous case where a plaintiff died, and his executors revived the suit; there they were responsible for all the costs. The same principle must apply here. The person who is next friend when the adjudication takes place is the person to whom the defendants are to look for all the costs.

 Emmet v. Dewhirst.

EMMET v. DEWHIRST.¹

April 26, 28, and 29, and November 10, 1851.

Specific Performance — Composition on Another's Debts — Release by a given Day — Mistake in Law — Right to retain Securities — Statute of Frauds, Sect. 4.

An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered into with such creditors only as actually signed before that day, and cannot be enforced in favor of a creditor who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified.

Where such an agreement contained no stipulation for giving up securities, a creditor declined to sign the release till the result of an action, brought by him against the acceptor of certain bills which he had discounted for the debtor, should be known: the guarantee insisting on the delivery of the bills, the settlement was postponed, and the release was not signed within the time specified by the agreement:—

Held, upon a bill filed by the creditor for specific performance of the agreement, that although both parties were under a misapprehension, the creditor being entitled to retain the bills, and although his failure to sign the release arose from such misapprehension, the creditor was not entitled to relief.

Held, obiter, that such an agreement, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement.

THE material facts of this cause will be found stated below, in the Lord Chancellor's judgment. The cause was heard before Knight Bruce, V. C., and by the decree it was referred to the master to inquire and state to the court whether James Harvey, in the pleadings named, acted as agent for the defendant, William Dewhirst, in the matters in the pleadings mentioned, or any and what part thereof; and whether the defendant adopted or agreed to the said acts of the said James Harvey, or any and what part thereof; and whether the defendant did, and under what circumstances, agree that the banking company in the pleadings mentioned should, as a creditor of Isaac Dewhirst, in the pleadings named, be admitted to participate in the benefits of the agreement of the 12th February, 1848, in the pleadings mentioned, upon and what other terms and conditions, or in any and what other manner, than therein mentioned. The defendant appealed against the whole of the decree.

James Russell and *Follett*, for the plaintiff. The agreement of the 12th February is binding upon all parties acquiescing in it, whether signing by the time appointed or not; for it is the constant course in equity, that if creditors act under a deed of composition, and thereby treat it as valid, this court will also act under it, and treat it as valid, whether such creditors have signed it or not; *Spottiswoode v. Stockdale*, 1 G. Coop. 102; and it is clear that the bank acquiesced in and acted under this agreement, and would have executed it, but for the refusal of the defendant's accountant to pay the composition, until

¹ 15 Jur. 1115. *Ex relatione* Mr. Vaughan Johnson.

 Emmet v. Dewhirst.

the bank delivered up the securities — a stipulation which the defendant had no right to make, for the agreement contained no provision for giving up securities in the hands of creditors. *Thomas v. Courtney*, 1 B. & Al. 1. The acceptances demanded by the defendant, unlike the bills in *Bush v. Shipman*, 14 Sim. 239; 1 Ph. 694, were collateral securities, which, as against the acceptor, the bank was entitled to retain; and all other creditors were to be informed of the understanding that they should be retained by the bank; and it is a rule, that, upon giving such information, a creditor may stipulate to retain the benefit of any security in addition to the amount of his composition. *Cullingworth v. Lloyd*, 2 Beav. 385; *Lee v. Lockhart*, 3 My. & C. 302. What passed between the respective agents of the bank and of the defendant was equivalent to execution of the agreement by the bank; and the latter, being bound by such virtual execution, are entitled to have the agreement, upon which they have no remedy at law. See *Tomlinson v. Gill*, 1 Amb. 330; *Gregory v. Williams*, 3 Mer. 582, enforced in this court. The decrees, therefore, should have been at once for an account and payment, without the preliminary inquiries directed by the Vice-Chancellor.

Swanston and *Willcock*, for the defendant. The agreement was entered into with those creditors only who should execute before the 1st March, and the plaintiff, not having executed by that day, is at law excluded from the benefit of the agreement. Nor is he entitled to relief in this court. Assuming *Spottiswoode v. Stockdale* to be accurately reported — which is doubted by Knight Bruce, V. C., in *Collins v. Reece*, 1 Coll. 675 — the bank did not act under, or even assent to, the terms of the agreement: it refused to assent unless allowed to retain the securities — a condition inconsistent with the agreement. *Cullingworth v. Lloyd*, and *Bush v. Shipman*. And whatever may be the general rule, if there be any rule as to extending indulgence, under a composition deed, to a creditor who does not claim the benefit of the deed within the time specified, that rule does not apply to a creditor who actively refuses to come in under and assent to the deed, and who does not retract such refusal within the time limited. *Johnson v. Kershaw*, 1 De G. & S. 260. With respect to what passed between the agents of the plaintiff and defendant, neither agent had authority to conclude, nor did either attempt to conclude, any new agreement having the effect of extending or varying the agreement of the 12th February. Besides which, we submit that no parol agreement (and it is admitted that the alleged new agreement was not in writing) could be substituted for that of the 12th February, which, being a promise to answer for the debt of another, is within the Statute of Frauds. The bill, therefore, should be dismissed.

James Russell, in reply, cited *Reay v. White*, 1 Cr. & M. 748; and *Bradley v. Gregory*, 2 Camp. 383.

November 10. LORD CHANCELLOR. The bill in this case was filed

Emmet v. Dewhirst.

by the plaintiff, William Emmet, as public officer of the Halifax Joint-Stock Banking Company, to compel a specific performance of an agreement of the 12th February, 1848, by which agreement the defendant, William Dewhirst, agreed with Thomas Turney, on behalf of himself and all the other creditors of Isaac Dewhirst, (a brother of William Dewhirst,) in consideration of a fiat against Isaac Dewhirst being abandoned, and of all the creditors forthwith accepting the composition, to guarantee a composition of 8s. in the pound to all the creditors of the said Isaac Dewhirst whose debts exceeded 20*l.*, who should, before the 1st March then next, sign a good and effectual release to the said Isaac Dewhirst of their respective claims on him. And the question in the case is, is the plaintiff, under the circumstances, entitled to a specific performance of that agreement?

The agreement was subject to a condition, viz., that a release should be signed before the 1st March then next, or rather the agreement was, in terms, made with those creditors only who should, before the 1st March then next, sign a release to Isaac Dewhirst. The condition was not performed, in point of fact, by the plaintiff; and the question is, if there are any circumstances connected with the non-performance of the condition which would entitle the plaintiff to equitable relief. No fraud is imputed on either side; certainly none is imputed to the defendant, William Dewhirst. The condition appears not to have been performed in consequence of a mutual misapprehension by the parties of their respective rights. In pursuance of the agreement, promissory notes were prepared to pay the composition of 8s. in the pound, of which 3*s.* was to be paid on the 1st March, and 2*s.* 6*d.* on the 1st October; and a release also was prepared. These documents were delivered to Harvey, an accountant, who was employed to deliver the notes, and obtain the sanction of the creditors to the release. The promissory notes to be delivered to the petitioner were calculated as on a debt of 1970*l.* 1*s.* 6*d.* This debt included two bills of exchange for 195*l.* and 300*l.*, accepted by Thomas Carter, which the bank had discounted for Isaac Dewhirst. These bills had been dishonored, but the bank expected some payment from Carter upon them, and wished to keep them, in order to receive the money, and declined to sign the release till the result of Carter's bills should be known. On the other hand, Harvey would not hand over to the bank the composition notes without Carter's bills being given up, as well as the release being signed. The agent of the bank who met Harvey on this occasion was a Mr. Caw, who informed Harvey that legal proceedings were taken against Carter to enforce payment, and it was hoped and expected that some part would be recovered, in which event the amount of the debt of Isaac Dewhirst would be diminished, and in that event the composition notes to be handed over, as also the debt expressed in the deed to be released, would require to be altered. Caw, under these circumstances, declined at that time to sign the release. Harvey, acting for the defendant, required the bank to give up Carter's bills, considering, that if the debt due to the bank was to be satisfied by the composition notes, and a release was to be signed, all securities were to be given up. But in

Emmet v. Dewhirst.

this he was mistaken; for as the agreement made no provision for the giving up of securities, the bank would be entitled to retain them. The consequence of this misapprehension on both sides was, that the settlement was postponed; and the question arises, whether there be any relief in equity with reference to the old agreement, or whether any new agreement was made under the circumstances.

In considering whether any new agreement was made, it is material to ascertain Harvey's authority. The bill alleges that it was agreed by and between Harvey and Caw, that Harvey should hold the promissory notes for the amount of the composition of the debt to the bank, and also the deed of release, until it was seen what the result of the proceedings against Carter would be; and that it was expressly stated by Caw, and that it was the fact, that the banking company fully agreed to and acquiesced in the agreement for the said composition, and that they were willing and ready, and intended most fully, to act on the same; and that they also fully agreed to and acquiesced in the deed of release, and held themselves bound by all the terms and provisions thereof, and that they were ready to execute the same whenever the result of the said proceedings against Carter was ascertained. The bill further alleges, that the banking company, under the circumstances and for the reasons therein mentioned, did not execute the deed of release, and Harvey did not hand over to the banking company the promissory notes; and that Harvey thereupon left the bank, and forthwith proceeded to hand over to the other creditors of Isaac Dewhirst the promissory notes for securing to them the instalments of the composition payable upon their respective debts, and to procure the execution by them of the said deed of release; and Harvey expressly informed the other creditors that the banking company had not executed the deed of release, but that they acquiesced in and agreed to the terms thereof, and were parties to the composition, and that all the other creditors thereupon accepted the composition, and executed the deed of release. The bill also alleges that William Dewhirst was in communication with Harvey while Harvey was completing the said arrangement, and was informed by Harvey of what had passed with Caw, and that William Dewhirst fully acquiesced in the said arrangement.

The defendant, by his answer, states, that in consequence of the proceedings of the plaintiff against him, the defendant's solicitor, since the 24th October, 1848, applied to Harvey for information as to what took place between him and the banking company on that occasion, and that such solicitor was informed by Harvey that he called at the bank, and saw Caw, and told him that he had called with Isaac Dewhirst's composition deed and promissory notes, and wished him to execute the deed, and to give up Carter's acceptances, upon his handing to Caw the promissory notes, signed by the defendant, but that Caw said that he would not give up Carter's acceptances until the bank saw what could be got from Carter's estate, and that, although a consenting party with the other creditors, he thought he had better delay signing the deed until he saw what could be got; and that Harvey also stated that he believed that Caw also said that

Emmet v. Dewhirst

he would not sign the release, without the assent of Isaac Dewhirst's guaranties to the bank, for his general balance of account; and, except as thereby appeared, the defendant could not set forth, as to his knowledge, information, remembrance, or belief, whether it was or not, or whether or not in consequence of the circumstances in the bill alleged, agreed by and between Harvey and Caw (so that, if any such agreement was made, it was without any authority given by the defendant, and was not binding on the defendant) that Harvey should hold the promissory notes for the amount of the composition of the debt of the banking company, or whether or not also the deed of release, until it was seen what the result of the proceedings against Carter would be. Caw and Harvey have both been examined as witnesses, and Caw states that he believes that Harvey called at the bank on the 18th February, 1848, and stated that he had come with the deed of release to be executed by the creditors, and with the promissory notes for the instalments of the composition upon the debt of the banking company. "The composition," he says, "was upon the whole of the banking company's debt, including the amount of Carter's bills. He asked me to give up Carter's bills to him. I said that I could not do so, as the banking company were endeavoring to recover on the bills. The real amount of the banking company's debt depended upon whether any thing could be recovered on the bills. He said he could not hand over the promissory notes for the instalments, unless the banking company gave up Carter's bills to him. I said I could not execute the release without receiving the promissory notes for the instalments, but that the banking company consented to the arrangement, and would execute the release when they had ascertained whether any thing could be recovered from Carter or not. He asked if he might give his personal assurance to the other creditors that the banking company would execute the deed, and that they agreed to the composition, and I said he most decidedly might do so. It was agreed between us that he should hold the promissory notes, and also the deed of release for the bank, until we had seen the result of the proceedings against Carter."

The witness Harvey states, that it was understood that the parties should give up any bills or acceptances before receiving their promissory notes for payment of the instalments. "My instructions," he says, "were to receive Carter's bills, held by the bank, before giving to them the promissory notes for the instalments. I was instructed by Mr. James Stansfield, who was Isaac Dewhirst's solicitor, to prepare the necessary promissory notes for the completion of the said agreement, and to get such agreement completed. I had specific instructions from Mr. Stansfield not to give up the promissory notes till the creditors had delivered up any bill they might hold. I called at the bank a few days afterwards, and saw Mr. Caw. My object in calling upon Mr. Caw was to inform him that Mr. Dewhirst had renewed the security, and to get him to sign the release or composition deed, and deliver up all bills, and give an indemnity in the form supplied to me by Mr. Stansfield, and, upon that being done, to give him the promissory notes. He consented to the composition, but

Emmet v. Dewhirst.

declined to give up Carter's bills. The amount secured by the promissory notes to the banking company was the amount of the instalments on their whole debt, without deducting the amount of Carter's bills. According to my previous instructions, I was to get up all bills before paying the composition; and, therefore, if I had got Carter's bills delivered up to me by the banking company, the amount of the notes to them would not have been altered. I took away with me the deed of release and the promissory notes, because I did not receive Carter's bills. I held the promissory notes until the latter end of September following, as I understood, for the purpose of paying them to the bank upon their delivering up Carter's bills." On the cross-examination he says: "I cannot recollect that I had received any authority from William Dewhirst to make any arrangements with the banking company or with Mr. Caw in relation to Carter's bills, or as to deferring the delivery of such notes and the execution of the release until such result should be known. I certainly had not authority in writing."

On the part of the plaintiff no evidence is given to show that Harvey had any authority to make a new agreement, and the result seems to be that Harvey's authority is not proved. It may, however, be worth while to consider what would have been the legal conclusion from what took place, supposing that evidence had been given to show that Harvey had authority to make a new agreement. This agreement is within the 4th section of the Statute of Frauds. It is a special promise to answer for the debt of another person. It is not a promise, upon a good consideration, to take the debt exclusively upon himself. It professes, in terms, to be a case of guaranty. The composition notes were to be the joint notes of Isaac Dewhirst, the principal debtor, and of the defendant William Dewhirst, as his guarantee or surety. The agreement is clearly within the 4th section of the Statute of Frauds, and must be in writing. Any alteration of the agreement must also be in writing. See *Goss v. Lord Nugent*, 5 B. & Ad. 58, (A. D. 1833,) and *Marshall v. Lynn*, 6 M. & W. 109, (A. D. 1840.) The latter case refers to *Stead v. Dawber*, 2 Per. & D. 447, (A. D. 1839,) overruling *Cuff v. Penn*, 1 Mau. & S. 21. See also *Stowell v. Robinson*, 3 Bing. (N. S.) 928. Therefore, whether what has passed between Harvey and Caw is or is not to be contended to be a variation of the old agreement, or as the formation of a new agreement, it ought to be evidenced by some writing; and it is clear from the whole evidence that no such writing exists; and the important difference between the evidence of Caw and Harvey shows the wisdom and benefit of the rule.

Then, if the defendant be discharged from the performance of the original contract, by reason of the non-performance of the condition, can he, in the absence of fraud, be charged upon a new parol agreement? It is an agreement to pay the debt of another, and it is an agreement with a condition annexed to it, which has not been performed; or rather, as I before remarked, it is not a contract with the bank, unless the release on their part was executed before the 1st March. The release was not executed on the part of the bank before

Russell v. Jackson.

the 1st March. The contract, therefore, never took effect, so far as the bank was concerned; and, in the absence of fraud, the authorities are distinct and decisive that no new parol agreement can be substituted. It is clear that, at law, such an agreement as this (viz. to pay the debt of another person) cannot be made and cannot be varied by parol; and in this court, unless there be fraud, the same rule prevails; and there is not even a suggestion of fraud. It is, therefore, immaterial whether any, and if any, what, parol agreement was entered into. Has any thing occurred to preclude the defendant from taking the benefit of the statute? He insists, in his answer, that he is not bound by the contract, because the release was not signed; and he denies that he gave any authority to make a contract, or that, in point of fact, any contract was made. There is no admission in answer of any agreement to dispense with the condition, or to extend the time for performing it. If there had been such an admission the court might have enforced its performance, but there is not any such admission. The agreement (if any) must be proved, and it cannot be proved by parol evidence, and the case affords no other. It cannot, therefore, be proved at all. I think it, therefore, unnecessary to make any reference to the Master, and to that extent the decree must be varied. I entirely concur with the Vice-Chancellor that the plaintiff is not entitled to any relief under the original agreement. The bill, therefore, must be

Dismissed with costs.

RUSSELL v. JACKSON.¹

July 26 and 28, and December 2, 1851.

Evidence — Professional Communications — Privilege.

In a suit by next of kin of a testator, challenging a residuary gift made by his will to his executors, on the ground that it was made on a secret trust for an illegal purpose, which the executors had promised to perform, the court *held*, that communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privileged; but that communications with reference to the will and the trusts thereof, had after the death of the testator, between the solicitor and the executors, who had continued to employ him as their solicitor, were privileged.

The rule, that communications between solicitor and client are privileged, does not, in the absence of an illegal purpose by a testator, apply to communications had between him and his solicitor with reference to the dispositions contained in his will; nor will such communications be protected, on the ground that they may lead to the disclosure of an illegal purpose entertained by the testator.

THIS was a motion to suppress the depositions of a witness taken under the first and second commissions in the cause. The facts of the case were the following: Joseph Russell, the testator in the cause, by will, dated the 8th July, 1840, gave the residue of his

¹ 15 Jur. 1117; 21 Law J. Rep. (N. S.) Chanc. 146.

Russell v. Jackson.

property to the defendants William Jackson and Thomas Acton Jackson, as a testimony of his regard and esteem for them, and as a compensation for the trouble they would have in the execution of his will; and he appointed the said William Jackson and Thomas Acton Jackson executors of his will. The bill was filed by one of the next of kin of the testator against William Jackson and Thomas Acton Jackson, and other defendants, alleging that the gift of the residue to the defendants the executors was made upon a secret trust to found a socialist school at Birmingham, and that the gift was made upon an understanding with those defendants that they would carry such trust into effect. The bill prayed relief accordingly. Solomon Bray, the witness by whom the depositions moved to be suppressed were made, was the solicitor by whom the testator's will was prepared, and who, after the death of the testator, acted as the solicitor of the defendants the executors. Upon his examination under the first commission, he stated, in answer to the thirteenth interrogatory, that the testator had given his residuary property to the defendants the Jacksons, intending them to hold it on a secret trust; and he demurred to an inquiry made by the interrogatory as to the nature of the trust; and he also demurred to other inquiries as to the instructions upon which he had prepared the will, and as to communications had with the testator and the Jacksons, assigning as a ground for his demurrer that he had acted in the matter as the solicitor of the testator and the Jacksons.

This demurrer was set down for argument, but was overruled by the court, no one appearing to support it. Upon the examination of the witness under the second commission, he stated that the general purport and effect of the instructions which he had received from the testator for the preparation of the will was declaratory of his intention to leave his property for the purpose of establishing a school at Birmingham for the education of children in the doctrines of socialism, as far as he recollected, according to the principles of Robert Owen, and that the instructions contained a scheme upon which the testator intended the proposed school to be conducted. He stated also, that on receiving the instructions, which, as appeared from the first examination, were brought to him by William Jackson, he, the witness, intimated a doubt whether the law would permit such a disposition of the testator's property as was contemplated by the instructions in respect of the scheme: that on subsequently seeing the testator, in the presence of both the Jacksons, he referred to the written instructions of the testator, and repeated his doubts as to the legality of the intended dispositions of the property for a school for the purposes mentioned; and that the testator then stated, that, having confidence in the two defendants, he would leave his property to them, being satisfied they would carry out his intention, which they well knew: that to this the defendant William Jackson assented, and that Thomas Acton Jackson did not dissent from it. The witness then deposed, that, in preparing the draft, he inserted powers of sale in the will, which were unnecessary but for the purpose agreed on between the testator and the two Jacksons. He then deposed, that, at the time he delivered over the original instructions and the will, mentioned in

Russell v. Jackson.

the first examination, to William Jackson, he told him he would require the instructions to enable him to carry out the testator's intention. The question was, whether these depositions of Bray were or not receivable as evidence against the Jacksons.

Rolt and *White*, in support of the motion to suppress the depositions. The communications between the testator and Bray, and between the latter and the Jacksons, were communications had with him while acting as their professional adviser. Such communications are the subject of privilege, and are protected from disclosure. *Beer v. Ward*, Jac. 77; *Cholmondeley v. Clinton*, 19 Ves. 261; *Greenough v. Gaskell*, 1 My. & K. 98; *Flight v. Robinson*, 8 Beav. 22. This privilege never ceases, *Wilson v. Rastall*, 4 T. R. 753, and it extends to every purpose. *Cromack v. Heathcote*, 2 Br. & B. 4; *Doe v. Harris*, 5 Car. & P. 592; *Herring v. Clobery*, 1 Ph. 91. The privilege continues after the death of the client, for the benefit of those claiming under him. *Chant v. Brown*, 7 Hare, 79; *Cholmondeley v. Clinton*, 19 Ves. 267. It does so in favor of a purchaser from the client; and we submit that it is equally available for a volunteer or devisee claiming under the client. Here the next of kin seek to defeat the act of the testator; the defendants seek to support it. In the case of a settlement by a lunatic being sought to be set aside by his committee, the solicitor to the lunatic would not be permitted to disclose the trust as against the settlor. So, here, the trustees are not, it is submitted, bound to disclose the trusts. *Wheatley v. Williams*, 1 M. & W. 533; *Knight v. Turquand*, 2 Id. 101. True, that here an attempt to defeat the law is alleged, but it is not proved. Admitting that there is no privilege in the case of fraud, yet it is submitted that the fraud must first be proved aliunde.

Malins and *Speed*, for the plaintiff, contra. It is alleged that the defendants are trustees upon a secret and illegal trust. Where there is fraud there is no privilege, for it is no part of a solicitor's duty to contrive a fraud. *Follett v. Jefferies*, 1 Sim. (N. S.) 1; s. c. 1 Eng. Rep. 172. So it is no part of his duty to advise his client how to defeat the law. The information required from the depositions sought to be suppressed is, in its nature, not a proper subject of professional privilege, inasmuch as it relates to matters of fact, and not to confidential communications made to the solicitor for the purpose of obtaining legal advice. *Bramwell v. Lucas*, 2 B. & Cr. 745; *Desborough v. Rawlins*, 3 My. & C. 521; *Walker v. Wildman*, 6 Mad. 47. The facts to which the information relates are, first, whether the defendants promised to perform a trust; and secondly, what the trust is. The rule as to privilege applies to cases between persons claiming under the client, and persons claiming adversely to him; but it has no application where the contest is between persons, all of whom claim under the client. There is no reason why it should prevail in favor of executors, to the exclusion of next of kin.

Walker, for one of the next of kin of the testator named as a defendant.

Russell v. Jackson.

The *Solicitor-General* and *W. M. James*, for other next of kin, defendants. The issue is, first, whether the defendants have promised to execute a trust; and, secondly, as to what the trust is. These are mere questions of fact, and not properly the subject of privilege. In the case of a will being disputed by the heir at law of the testator, the solicitor acting in the preparation of the will may be called to show what the motive of the testator was. So in suits for rectifying settlements between parties claiming under them, the solicitor's evidence as to the intention of the settlor is receivable. *The Duke of Bedford v. The Marquis of Abercorn*, 1 My. & C. 312.

Rolt, in reply. No fraud has been shown in this case. A fraud, if any, must be proved *aliunde*. It cannot be presumed, and you cannot examine the solicitor to prove it. The cases as to the rectification of settlements were not cases of professional communications. The plaintiff in this case proposes to defeat the testator's intention; the defendants, to carry it out. The court will not assist the plaintiff in his object. As between the next of kin and the executors, it is submitted that the latter are entitled to the benefit of the privilege. The privilege, in fact, follows the property; and the executors, and not the next of kin, are those who represent the property of the testator and his intention.

Sir G. TURNER, V. C., after stating the facts as detailed above, delivered judgment as follows: The question is, whether the statements thus made by the witness, or any of them, ought to be received in evidence against the defendants, the Jacksons. The question must be separately considered with respect to communications had in the lifetime of the testator, and those which were had after his decease; but I do not think, with reference to communications had in the testator's lifetime, that any distinction can properly be made between the communications had with the testator and those had with the defendant William Jackson; for I think the defendant William Jackson, in the communications had with Bray, must be considered to have acted as agent of the testator, and as the channel of communication between him and the witness; and that the protection the law throws around communications of this nature extends to those had through the medium of an agent, as far as they would extend when they are had with the principal. As to those communications had in the lifetime of the testator, I think the evidence ought to be admitted.

It is evident that the rule, which protects from disclosure in cases of confidential communications between solicitor and client, does not rest simply upon the confidence reposed by the client in the solicitor; for no such rule exists in other cases, in which, at least, equal confidence is reposed—in the cases, for instance, of a medical adviser and his patient, and a clergyman and a prisoner. The rule seems to rest, not on confidence, but upon the necessity there is for carrying the rule out. Lord Brougham, in *Greenough v. Gaskell*, 1 My. & K. 98, has given the true foundation of the rule. His Lordship, in his judgment in that case, is reported to have said, "The foundation of

Russell v. Jackson.

the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection; though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case."

This, then, being the foundation of the rule, the courts, when called upon to apply it, must have regard to the foundation on which it rests, and not extend it to cases which do not fall within the mischief which it was designed to meet. Where the rights and interests of clients, or of those claiming under them, come in collision with the rights and interests of third parties, there is no difficulty in applying the rule. If it were not applied in such cases, the client could never safely state to his solicitor the true position of his case, but would be driven to speculate as to what it was his interest to conceal or divulge. The prosecution or defence of his rights would not be adapted to the circumstances as they really existed, and courts of justice would be embarrassed by imperfect information, arising from imperfect communications; but when we pass from cases of conflict between the rights of a client and parties claiming under him, and those of third persons, to cases of a testamentary disposition of a client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client, and the apprehension of it can present no impediment to a full statement of his case to the solicitor, unless he were contemplating an illegal disposition, a case to which I shall presently refer; and the disclosure, when made, would expose the court to no greater difficulty than it has in all cases where the views and intentions of parties, or the objects for which the disposition is made, are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting; and in the absence of any illegal purpose entertained by the testator, there does not appear to be any ground for applying the rule in such a case.

Can it be said, then, that the communication is protected because it may lead to the disclosure of an illegal purpose? I think not, and that evidence, otherwise admissible, cannot be rejected on such a ground. On the contrary, I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. When a solicitor is a party to a fraud, there is no privilege attaching to communications between the client and him upon the subject of the fraud, because to contrive fraud is no part of a solicitor's duty; and I think it can as little be said that

Russell v. Jackson.

it is part of a solicitor's duty to advise his client here as to the means of evading the law.

Another view of the case is, that the protection which the rule gives is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust. The argument for the defendants was, that the privilege did not terminate with the death of the client, that it belonged to a purchaser from the client, and that this must equally apply to the case of a volunteer under him; in fact, that the privilege followed the legal interest, and vested in the executors claiming under the will, and not in the next of kin claiming adversely to it. That the privilege does not in all cases terminate with the death of the party I entertain no doubt; and that it belongs to parties claiming under the client as against those claiming adversely to him I entertain as little doubt; but it does not therefore follow that it belongs to the executors of the party as against his next of kin, in such a case as the present. In the one case, where the question is whether the property belongs to the client or his estate, indeed, the rule may well apply for the protection of the client's interest; but in the other case, where the question is, to which of two parties claiming under the client the property in question belongs, it seems to be merely arbitrary to hold that the privilege belongs to one rather than to the other. The privilege being one which follows the legal interest, it must be subject to the same incidents to which the legal interest is subject; and if the legal interest is subject to a trust, the privilege must be subject to it also; and in that view of the case, to permit the defendants to avail themselves of the privilege would be to permit them, by the use of the privilege, to exclude the question, whether they are trustees of it or not.

These are the views I entertain of the question, without reference to the authorities. Those which were cited on the part of the defendants do not appear to me to affect the question. General remarks found in the books must of course be understood with reference to the cases in which they are found, and none of the cases at all approached the present; they were all cases arising between the clients, or parties claiming under them, and adverse claimants. There are, however, cases which, I think, approach more nearly to the present case, and in which the court received and acted upon such evidence as that objected to, without hesitation. Thus, in *The Duke of Bedford v. The Marquis of Abercorn*, 1 My. & C. 312, the court received and relied upon the evidence of the solicitor as to the intention of the parties to marriage articles, and directed a settlement differing from the articles, mainly on the faith of such evidence; and in *Nourse v. Finch*, 1 Ves. jun. 342, where the question was, whether the executors were trustees for the next of kin of undisposed-of residue, the evidence of the solicitor who had prepared the will, as to what had passed between him and the testator, was received, and minutely commented on in the judgment. Those cases, and particularly the latter, have a strong bearing on the present; and on the

Piddocks v. Smith.

authority of them, or of the principle of them, my opinion is, that the evidence of communications which took place in the testator's lifetime must be received.

With respect to the evidence of what passed between Bray and William Jackson upon the occasion when instructions were delivered to him after the death of the testator, I think the case stands upon a different footing. That was clearly a communication between solicitor and client in the course of professional business, and all principle and all authority are against its reception. The depositions to this extent ought to be suppressed. I grant the motion, so far as it relates to the communications between the witness Bray and the defendant William Jackson after the death of the testator, but refuse it so far as respects the communications had in the lifetime of the testator. The question is one of great importance. I give no costs.

PIDDOCKE v. SMITH.¹

December 11 and 13, 1851.

Lunatics — Guardian ad Litem to, without Commission.

Guardian *ad litem* to lunatic defendant (not so found by inquisition) appointed without a commission.

MOTION by the plaintiff that H. might be appointed guardian *ad litem*, without a commission for that purpose, to the defendant Thomas Piddocke, a lunatic, not so found by inquisition. Affidavits were filed by the wife of the lunatic, and the doctor who attended him, proving his lunacy, and by the solicitor in the cause, proving that H. was a fit person to be appointed guardian *ad litem*.

W. H. Terrell, in support of the motion, cited *Drant v. Vause*, 2 Y. & C. C. C. 524.

H. F. Bristowe, who appeared to consent, cited *Howlett v. Wilbraham*, 5 Mad. 423.

Sir G. TURNER, V. C., declined to make the order without a commission, but said the case had better be mentioned to the Lord Chancellor.

December 13. *W. H. Terrell* then applied to the Lord Chancellor, citing the above cases of *Drant v. Vause* and *Howlett v. Wilbraham*; and the Lord Chancellor, after reading the affidavits, made the order.

¹ 15 Jur. 1120. *Ex relatione* Mr. H. F. Bristowe.

Re Tyler.

*Re THE TRUSTEE ACT; Re TYLER'S TRUST.*¹

November 21, 1851.

Construction of Section 32, of the Trustee Act, 1850—"Existing Trustees."

All the trustees of a will declined to act, and did not act or take upon themselves the trusts of the will. A petition was presented for the appointment of certain persons as trustees "in the place or stead of" the trustees so declining to act, who appeared by counsel, and disclaimed:—

Held, that the disclaiming trustees were, nevertheless, "existing" trustees, so as to authorize an order appointing the new trustees in their "place or stead," within the meaning of the 32nd section of the above act.

THIS was a petition, by a person beneficially interested in certain trust property, for the appointment of new trustees thereof, and for vesting the said property in them. The petition stated, that by his will, dated in 1843, Isaac Tyler devised certain real estates to E. Elms and J. Elms, and the survivor of them, and the heirs and assigns of such survivor, and also bequeathed to them certain personal property, upon the trusts therein mentioned; and he appointed his brother, George Tyler, and the said E. Elms and J. Elms, executors of his said will; that in May, 1851, the testator died, and shortly afterwards the said George Tyler, E. Elms, and J. Elms renounced the probate of his said will, and the said E. Elms and J. Elms also refused to take upon themselves or to act in, and in fact did not take upon themselves or act in, the trusts of the said will. It prayed that two persons named should be appointed trustees of the said will in the place or stead of the said E. Elms and J. Elms, and that the trust property might be vested in such new trustees.

Kenyon Parker, for the petitioner, asked that the new trustees might be appointed in the place of the trustees declining to act, without the usual reference to the master to inquire as to the fitness of the persons proposed. He had affidavits to prove that fact, and that all proper parties were before the court.

Elderton, for the proposed new trustees, appeared, and consented.

E. M. Harrison, for the trustees named in the will, said there had been no formal disclaimer, but the trustees named had not acted in any way, and he appeared to disclaim the trusts on their behalf.

C. Hall, for all the parties beneficially interested, except the petitioner, consented, but he suggested that there was a difficulty under the precise words of the act, which he would submit to the decision of the court. The words of the 32nd section were, "it shall be lawful for the said Court of Chancery to make an order appointing a new

¹ 15 Jur. 1120; 21 Law J. Rep. (N. S.) Chanc. 16.

Leslie v. Smith.

trustee or trustees, either in substitution for, or in addition to, any *existing* trustee or trustees." Now, here, it was asked that the new trustees should be appointed in the place of those who had disclaimed. Could these be called "existing trustees"? On their disclaimer the real estates vested in the testator's heir. Ought not the order to be to appoint the new trustees in the place of the heir, who was the only person who could be called an "existing trustee"? He said that an appointment had been made in the place of the heir as the only existing trustee, in a case in which all the other trustees were dead.

SIR J. PARKER, V. C., said he did not think that the heir was a trustee within the meaning of the section. It was true, the heir had the estate in him, but he was no trustee in this sense. He thought the construction suggested would be a narrow construction of the act. If the words were taken so literally, a deceased trustee would not be an "existing trustee," and the court would not have power to replace him. He thought the construction suggested was too narrow to be maintained. His honor referred to the case of *Sharp v. Sharp*, 2 B. & Al. 405, where the words, "surviving trustee in a power to appoint new trustees," were construed to mean a trustee continuing to act, and quoted it as an authority for a reasonable latitude of construction in such a case as the present. *Order as prayed.*

LESLIE v. SMITH.¹

December 3, 1851.

Practice — Claim — Parties — Order 7, of April, 1850.

An administration claim was filed by an executor against his co-executors only, without making any person beneficially interested a defendant:—

Held, that one at least of the persons beneficially interested must be made defendant to such a claim in the first instance. This would be necessary where the claim was to administer personal estate only, and *a fortiori* where it seeks administration of both real and personal estate.

THIS was a claim by one of three executors against the other two, seeking for the administration of the testator's real and personal estate. None of the persons beneficially interested in the property were parties to the suit. An order had been made on the claim, which the registrar objected to draw up, on the ground that the suit was defective for want of parties.

Drewry, for the plaintiff, argued that it was not necessary, in the first instance, to make the persons beneficially interested parties,

¹ 15 Jur. 1120.

Leslie v. Smith.

They might be summoned by the master under the 18th of the orders of April, 1850. By the 5th section of the 1st of these orders, an executor or administrator of any deceased person is authorized to file a claim for administration. By the 7th of the above orders it is directed, that "in the case provided for by the 5th article of order 1, any one person who, under the 3d or 4th article of order 1, might have claimed relief against the executor or administrator of the deceased person whose personal estate is sought to be administered, and the co-executor or co-administrator, if any, of the plaintiff, may be named in the writ of summons as defendants to the suit; and, in the first instance, no other person need be therein named." That order meant chiefly to provide for the case of there being only one executor or administrator, and where it was therefore necessary to make some person beneficially interested a defendant. This appeared clearly from the 8th order, which provided, that "in other cases the only person who need be named in the writ of summons as the defendant to the suit, in the first instance, is the person against whom the relief is directly claimed." In this case the plaintiff alleged neglect in performing the trusts of the will, and asked for the accounts. If the plaintiff was obliged to bring before the court one person beneficially interested, why not all? and what, then, was the use or meaning of the 8th order? The main object of these orders was to relieve a plaintiff from the necessity of making all persons interested parties to a suit in the first instance.

Chichester, for the defendants.

SIR J. PARKER, V. C., said that he should have great difficulty in thinking that this claim was not defective for want of parties. His honor referred to the 5th article of the 1st order, and also to the 7th order, as cited above. The persons mentioned in the 3d and 4th articles of the 1st order, and alluded to in the 7th order, were persons beneficially interested in the personal estate of a testator or intestate. The orders proceeded on this principle—that where you have an estate to administer, it is sufficient to bring one person beneficially interested in the estate before the court; but there must be at least one. The present was not a common claim, because it sought to have an administration of both real and personal property. Where the claim was for administration of personalty only, the orders made it necessary to have one person interested in the estate of a party, *a fortiori* where both real and personal property are sought to be administered. His honor thought that the 7th order pointed out distinctly who must be made a party, viz., any one person who might himself have filed a claim against the executors for the same relief. The claim must stand over, with liberty to amend by adding some one interested in the property as a defendant. The orders had introduced a great change in the practice, by making it sufficient to have one such person only.

Ham's Will; *Ex parte* Biles.

HAM'S WILL; *Ex parte* BILES.¹

November 12 and 14, 1851.

Will — Class — Lapse — Trustee Act — Costs.

A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster, and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator: —

Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees.

Costs borne by the shares which went to the residuary legatees.

JOHN HAM made a codicil to his will on the 13th September, 1844, as follows: — “Memorandum. — Whereas, on my marriage with my late wife, Eleanor Biles, I entered into a bond to leave her the sum of 800*l.* on my death, as in the said bond is mentioned, and I intend shortly to sell out 6000*l.* stock, part of the sum of 20,000*l.* stock now standing in my name in the 3*l.* 10*s.* per cent. annuities, and to distribute the same in my lifetime amongst her relations, in such manner as I intend, in lieu of any claims for the said sum of 800*l.* under the said bond. Now, I do hereby will and direct, that, in case of my death before carrying such my intention into effect, the said sum of 6000*l.* stock shall not be considered as part of my residuary estate, but shall be divided between and amongst the said relations of my said late wife, in such manner, shares, and proportions as would have been the case in case my said late wife had died possessed of the said sum of 6000*l.* stock, a spinster, and intestate.” The bond referred to in the codicil was given by the testator on his marriage with his wife Eleanor, in the year 1799, and was to the effect that 800*l.* should be vested in trustees, in trust to pay the interest to the said John Ham during his life, and after his decease to his wife, the said Eleanor Ham, during her life; and after both their deaths, that the said sum of 800*l.* should be divided between the children of the said marriage, as the survivor should appoint by deed or will, and in default of such appointment, to the children equally; and in case there should be no issue of the said marriage, then to be paid to such person as the said Eleanor Ham should by deed or will appoint; and in default of such appointment, to the executors and administrators of the said Eleanor Ham. The said Eleanor Ham died in July, 1844, without having made any appointment under the bond, and without issue. John Ham took out letters of administration of her effects, and died on the 15th February, 1849. He did not distribute the 6000*l.* stock in his lifetime, but his executors sold out 6000*l.* stock, which produced 5593*l.*, which sum the executors then paid into the bank under the Trustee Relief Acts. The master made his report, finding that there were sixteen persons next of kin to Eleanor Ham at the time of her death, five of whom died afterwards in the lifetime of John Ham. A

¹ 15 Jur. 1121; 2 Simons, (N. S.) 106.

Ham's Will; *Ex parte Biles*.

petition was now presented, praying a declaration that the next of kin of Eleanor Ham living at the time of the death of John Ham were the persons entitled to the fund.

Walker and *Sandys*, for the petitioners, some of the eleven next of kin who were alive at the death of the testator, contended that the whole passed to them, and that the representatives of the five deceased next of kin took no share. *Viner v. Francis*, 2 Cox, 190; 2 Bro. C. C. 658; *Martin v. Wilson*, 3 Bro. C. C. 324; *Shuttleworth v. Greaves*, 4 My. & C. 35; *Shaw v. M' Mahon*, 4 Dru. & W. 431; *Lee v. Pain*, 4 Hare, 201; *Gaskell v. Holmes*, 3 Hare, 438; *Cort v. Winder*, 1 Coll. 320.

Malins and *Wolstenholme*, for others of the next of kin. We wish to exclude those who died in the lifetime of the testator. If the wife had survived the husband, she would have been entitled to the capital of the 800*l*. As donor and administrator to his wife, he meant to give it to the same persons who would have taken under the bond, and thought that the relations of his wife had some claim. He therefore gives the money to them, and not in shares, which might pass it to strangers. This is a gift to a class, *Doe v. Sheffield*, 13 East, 528, and can only include those alive at the time of his death. The words "executors and administrators" are only words of limitation. *Kirkpatrick v. Capel*, 1 Sudg. Pow. 79.

Bethell and *G. M. Giffard*, for the personal representatives of the next of kin of the wife at the time of her death who had died in the interval between her death and the death of the testator. The words mean that the money is to pass as it would in case it had been the wife's, and she had died intestate and unmarried, *i. e.* to her next of kin at that time; and they are therefore to be sought for, and are the persons absolutely entitled. There is no gift to a class. Suppose the wife had survived the husband, and died intestate and unmarried, no one can then doubt that all her next of kin would have taken interests.

Grove and *Attwood*, for other parties.

K. Parker and *Milne*, for the residuary legatees.

Walker, in reply.

SIR R. KINDERSLEY, V. C. The first question is, whether the gift is to be considered as one made on a mistaken supposition of liability to debt; and as that supposition was entirely in error, whether, therefore, the gift fails altogether. That was the first point raised by Mr. K. Parker. Is there, then, such a mistake as to make the gift void on that ground? The testator, in the codicil in question, refers to what he calls the claim for 800*l*. on bond; and no doubt that language might be considered to show that he thought-he was liable to

some legal claim, on the part of his wife's relations, as to that 800*l*. It is clear to me, also, that he refers to claims, on the part of the relations, of a very different nature from claims constituting a legal liability. My own impression is, that he did consider, that as by the terms of the bond 800*l* was limited, so that in the event of there being no issue, which happened, it was to go to his wife absolutely, he might have considered, that if she had happened to survive him, and then died intestate, as she has done, her relations,—her next of kin—would have been entitled to the 800*l*; and even if she survived him, and died testate, her relations would have derived some benefit under some testamentary act of hers. When, therefore, he speaks of that claim, he may have considered that they had some sort of moral claim to his consideration, as they might be disappointed in finding, that by the death of the wife, having made no appointment, he had, as administrator, become entitled to this absolutely; and it is clear that he is liberal to his wife's relations. It appears to me from this, that if he wished to satisfy the deed only, he would not give 6000*l* stock to satisfy the legal liability, which never could exceed 800*l*. That he did consider that his wife was entitled to this is clear from the language he uses in the outset; for he says—“Whereas, on my marriage with my wife, Eleanor Biles, I entered into a bond to leave her the sum of 800*l* at my death.” That was not exact; the condition of the bond are the trusts of the settlement; but, in the event of there being no children, it was to be for her absolute power of appointment, and, in default of appointment, for her executors and administrators. But he treats it as left to her. There is, however, no ground for contending that, by reason of a mistaken supposition of his being under legal liability, the bequest is void.

The next question is, whether it is not void on the ground of uncertainty of description of the person to take. In the first part of the codicil, where he refers to what his intentions were, he speaks of the relations in this way. He says—“I intend shortly to sell out 6000*l* stock, part of the 20,000*l*,” and to distribute the same in his lifetime amongst her relations, in such a manner as he intended, in lieu of any claims. No doubt, if he had done that in his lifetime, he might have given to any relations, and he might have excluded any he pleased—he might have done exactly as he pleased; and there is no description of the class of persons whom he intended when he speaks of “her relations,” but what he is there speaking of is what he intended to do by some act in his life; the bequest, however, is what he directs to be done in case he does not do this in his lifetime. He says—“Now I direct,” &c. Now, when we look back to see who “the said relations” are, we find it is “her relations;” and it appears to me that the gift is as if he had said, instead of amongst the “said relations,” it had been, “amongst the relations of his wife.” Whatever effect the court would give to the word “relations,” it would give to “relations of my late wife.” Now, a gift to relations is not void for uncertainty, but has generally been held to mean next of kin. There may be something else in the will which may make it void for uncertainty, but it is not void of itself.

Being, then, of opinion that it is neither void on the ground of mistaken supposition of debt, or on the ground of uncertainty, the next ground is, that the shares, at all events of those who died between the death of the wife and the death of the testator, have lapsed to the residuary legatees. That question I will consider after considering some of the points raised by Mr. K. Parker. There were sixteen persons next of kin of the wife at the time of her death, in July, 1844, and at the death of the testator eleven only were living, five having died. Now, the first point raised, at least the first point which I shall consider, is this — that when the testator, in the codicil, says, "in such manner, shares, and proportions as would have been the case in case my said wife had died possessed of the said sum of 6000*l.*, a spinster, and intestate," I am to hold the meaning of the testator was, "in case his wife had lived just to the period at which the testator himself had died and she had then died a spinster, and intestate." I cannot accede to that view; the testator, in his codicil, refers to the fact that she was dead, calling her his late wife. Knowing that she had died in the preceding month of July, he inditing the will in September, refers to the fact, and says, "In case my said late wife had died." It appears to me that he clearly meant not to suppose the case of her not being then dead, but to put it on the same footing as if she was still living. But he means, as if, at the time of her death, she had been possessed of this sum, and had died a spinster, and intestate. It appears to me that he refers to no other period than that at which she did die, i. e. July, 1844.

The next point is this — it is said, "supposing that to be so, still, according to the decided cases, if a gift is not to a *persona designata*, but to a class of persons, and some of that class of persons die in the interval between the date of the will and the death of the testator, those members of the class who survive shall take the whole." But these are persons who are to be considered by the testator as intended to take. The rule, however, is really this — where the testator gives a legacy or residue to persons whom he designates in such a way as to represent them as a class, for instance, to the children of A, there the period of distribution of the gift is the death of the testator, and the persons who constitute the class at that period shall be considered the persons intended, unless it appears that the testator intended something different from it. That may be illustrated thus: — "I give to the children of A at the death of A:" he knows, of course, when the period of distribution is; yet, if the will does not show that he intended that if any died in the interval the shares should lapse, the persons who at the period of distribution, that is, at the death of A, were the children of A, would be the persons to take. If he had said, "I give to the five children living at the death of A, in equal shares," how can you say, that if one of these five children, they being tenants in common, dies, the four who survive shall constitute a class? Therefore it appears to me that you must look at the whole scope of the will for the purpose of seeing whether the testator has indicated any intention to refer to persons constituting a class at the period of distribution. Now, if this had been a

special gift to the wife's relations, the case stated would have justified the construction of a gift to the relations of the wife living at the death of the testator; but we have here something which points out very sufficiently what the testator intended as to the persons constituting the class of wife's relations; for he says, "the 6000*l*. shall be divided between and among the said relations of my said wife, in such manner, shares, and proportions as if she had died possessed of the said sum, a spinster, and intestate." Now, what does he mean? He means it is to go to those persons who, as being relations, i. e. next of kin, would at her death have been entitled to her personal estate by law, in case she had died a spinster, and intestate; and he has shown what he meant by the term "relations," i. e. the persons who are to take under the Statute of Distributions; but he has shown that he means each person to take, not only in the manner in which he would have taken, but to take his share and proportion.

It appears that the wife at the time of her death left sixteen relations, nephews and nieces, who exactly answer the description of relations who would have divided this amongst them in case the wife had so died. Now, if those who survived are to take the whole fund among them, they do not take either in the manner, shares, or proportions in which the testator says they are to take; and I should set aside the words of his direction if I were to say that he had declared they were to take, and in the same manner, if I were to say I will give it to the eleven persons in different shares. I am of opinion, therefore, that the persons to whom the testator has given these 6000*l*. under this description are the sixteen persons who were next of kin of the wife living at her death. Now the fund is given to them in the same manner, shares, and proportions as would have been the case in case she died a spinster, and intestate. Then what would have been the manner? It would have been as tenants in common. It is, therefore, a gift to these persons as tenants in common; and the plain, ordinary effect of a gift in common to persons, some of whom predecease the testator, is a lapse of those shares. But it has been contended by Mr. Bethell that the legal personal representatives of those who died in the lifetime of the testator are to take, i. e. that you are to read the codicil thus—it is to go now to the same persons as if she had died possessed of this specific sum, and intestate, in 1844, and as if they had not died or parted with it; i. e. I am to try and find out, as to each of those persons who had taken a share of the 6000*l*., what, according to the whole history of his subsequent life, had become of this share of the 6000*l*. It is clear that the testator could have no such meaning as that. It is a gift to those persons as tenants in common; and if any have died in the lifetime of the testator, their shares have lapsed, and go to the residuary legatees. I am of opinion that the 6000*l*. is divisible into sixteen shares, and the surviving next of kin will take each one share. As to the five shares undisposed of, they go to the residuary legatees.

A discussion then took place as to the manner in which the costs were to be borne.

Ham's Will; *Ex parte Biles*.

Malins contended that the costs must fall on the residue. If there had been a suit it must have been so; and the fact of this money having been paid into court in this manner can make no difference. If it had been a legacy of 100*l.*, the whole would have been absorbed by this proceeding. *Re Sharpe*, 15 Sim. 470.

G. M. Giffard. There will be no difficulty in this case, as there is in court five sixteenths, which has just been decided to form part of the residue, and the costs should be paid out of that.

K. Parker and Milne, for the residuary legatees. The court has no jurisdiction over the residue, or over the executors. How can the court make the executors pay the costs, when it is impossible to ascertain whether there is any residue? In cases under the Legacy-duty Act the petitioner bears the costs of his application. *Ross's Trust*, 1 Sim. (N. S.) 196; s. c. 2 Eng. Rep. 148; *Bartholomew's Trust*, 16 Sim. 585; 14 Jur. 181; *Croyden's Trust*, 19 Law J. Rep. (N. S.) Chanc. 182; 14 Jur. 541.

SIR R. KINDERSLEY, V. C. The inference to be drawn from these cases is, that if the court has power to deal with the residuary estate, then that the costs will be paid out of the residuary estate: the inference from the other cases is, that the advantage of a speedy and summary jurisdiction is meant by the legislature to compensate for the payment of costs. My own opinion upon the point is clear, that I have no jurisdiction over any thing else than the fund paid into court; and if the whole fund were a particular legacy, I should be obliged to direct the costs of all parties to be paid out of the legacy, and the legacy would lose that benefit; and, as Mr. Malins has said, it would be a great hardship if the legacy is small; but I am afraid that that is a necessary result, for I cannot understand how, though the trustees are present, I can have jurisdiction to order payment out of the residue, which is not before me. The trustees might say they do not admit a residue; and I could not try the question whether they had any or not. But here, it being clear that I have jurisdiction over this fund, and I find that part of the fund is residue, then the costs of the discussion which takes its rise upon the construction of the will should be paid for by the residue, as far as I have to deal with the residue. Having, therefore, determined that five sixteenths is residue, and having complete jurisdiction over the whole fund, it appears to me that I should not only not be going out of the rule laid down by the cases, but that I should be in exact accordance with the general principles of the court. I will direct the costs of all parties to be paid out of the five sixteenths, though of course it is a hardship upon the residuary legatees, as it would have been if there had been a suit to administer the whole estate.

 Stainton v. Chadwick.

STAINTON v. CHADWICK.¹

July 24, 28, and 29, and November 8, 1851.

Discovery — Title — Fraud in obtaining an Order for the Conveyance of an outstanding Legal Estate.

Bill by A, claiming to be heir at law of C, against B, also claiming to be heir at law of C; alleging that B had presented a petition to this court under Sir E. Sugden's Act, and had obtained a conveyance of the outstanding legal estate to him, as the heir at law of C; and alleging that the evidence and statements presented by the defendant to the master, upon the faith of which the master was induced to report (contrary to the fact) that B was the heir at law of C, were false and fraudulent; praying a declaration that B was a trustee of the legal estate for him, and that he should be restrained from using it against him. The bill contained various interrogatories, addressed to the discovery of the alleged false and fraudulent evidence and statements. The defendant, by his answer, denied A's title, and he refused to answer any of the interrogatories relating to the evidence and statements produced before the master, on the ground that he could not give that discovery without disclosing the evidence of his own title; but he denied that any of such evidence or statements were either false or fraudulent, or that they would prove any of the allegations in the bill:—

Held, affirming the decision of the late Master of the Rolls, allowing exceptions to the answer, that B was not protected from the discovery, which was required as a means to establish the fraud averred in the bill, although, incidentally, B may have to disclose his own title.

THE facts of this case are so fully stated in the judgment, that it is only necessary to state more fully two passages from the bill, together with the corresponding denials of them by the answer. The bill alleged "that the whole of the evidence adduced before the said master on behalf of the defendant, and in support of that part of the case whereby he seeks to be entitled through James Chadwick, was untrue, and was fraudulently concocted, and was supported by evidence which was without any legal foundation." The answer to that was as follows:—"And this defendant submits, that, for the reasons hereinbefore mentioned, this defendant is not bound to set forth, and this defendant refuses to set forth, whether this defendant seeks to be entitled under James Chadwick; but this defendant denies that the whole or any part of the evidence adduced before the said master on behalf of this defendant, in support of that part of his case whereby he seeks to be entitled through James Chadwick or any other person, was untrue, or fraudulently concocted, or that such claim of this defendant as he asserted before the said master was without any legal foundation." The bill charged the possession by the defendant of divers affidavits, copies of affidavits, &c., used before the said master on the said inquiry, "from which, if produced, it will appear that the said defendant is not the heir at law of the said Sir Andrew Chadwick, and that the evidence upon which he was found to be beneficially entitled to the said estates was not entitled to credit." And it also charged the possession by the defendant of deeds, books, papers, &c., "whereby the truth of such matters, or some or one of them, would appear." The defendant set forth a schedule of these affidavits, and of deeds, books,

 Stainton v. Chadwick.

and papers, but claimed that they should be protected from production; and by his answer he denied, "that from such particulars, or any of them, if produced, it would appear that this defendant is not the heir at law of the said Sir Andrew Chadwick, or that the evidence upon which this defendant was found to be beneficially entitled to the estates in the said bill mentioned, or any part of such evidence, was not entitled to credit, or that the truth of the several matters stated or charged in the said bill, or any of them, would appear." The bill contained a great number of interrogatories directed to the discovery of the false and fraudulent evidence and statements alleged to have been used by the defendant before the master. The defendant declined to answer any of these interrogatories; and the plaintiff took exceptions to the answer, as well in respect of those interrogatories as to certain other interrogatories directed to the discovery of the pedigree of the defendant. The Master of the Rolls overruled the exceptions as to the discovery of the defendant's pedigree, but allowed the other exceptions.

R. Palmer and Bird, for the appeal. The Master of the Rolls overruled all the exceptions which went directly to the question of pedigree; but the same thing has been done indirectly by allowing the exceptions as to the affidavits and other documents produced before the master, as would have been done by giving the discovery of the pedigree of the defendant. This is a bill by one person claiming to be entitled to the same property which the defendant claims, and the answer denies that the documents in question prove the plaintiff's title; the plaintiff can, therefore, not be entitled to the discovery of the defendant's title. Mitf. Plead. 189, 191, 4th ed.; Wig. on Dis. 264, 270, *et seq.*; *Wilson v. Forster*, M'Cl. & Y. 274; *Younge*, 280; *Firkins v. Lowe*, 13 Price, 193; *Bolton v. The Corporation of Liverpool*, 1 My. & K. 88. The plaintiff alleges fraud in the concoction of the evidence before the master; but this is distinctly denied by the answer, and this allegation, therefore, cannot entitle him to the discovery. The plaintiff has no right to any discovery until he proves his equitable title. *Abery v. Williams*, 1 Vern. 27; *The Marquis of Donegal v. Stewart*, 3 Ves. 446; *Phelips v. Caney*, 4 Ves. 107; *Jacobs v. Goodman*, 2 Cox, 282.

The Solicitor-General (Sir W. Page Wood) and *Glasse*, contra. If the defendant had brought an action of ejectment while we were in possession of the rents, we would not have had to prove our title as heir or purchaser; our proving the possession would have been a sufficient answer. But the order that has been improperly obtained under Sir E. Sugden's Act has exactly reversed our positions. We only require to be reinstated in the position in which we were before that order, and then the defendant here must be the plaintiff at law.

[LORD CHANCELLOR. As a general principle of law, it is said that a man who has improperly obtained possession of an estate cannot use that possession as an impediment to the other party. *Doe v. Smythe*, 4 Mau. & S. 347, is a leading case on this point, but the cases are

Stainton v. Chadwick.

collected in 1 Saund. 326 a. It appears to me to be a matter of extreme difficulty to distinguish what discovery you are entitled to, for the purpose of setting aside the improper order, and what relates to the title of the defendant.]

That is the fault of the party who has, by his improper act, created this difficulty. The defendant does not state, in his answer, that he did not know of any claim by us, but that he did not know of any reasonable pretence for our claim. We say that the order was obtained in fraud of the act of parliament, and we submit that we are entitled to sift the transaction completely. The other side used the word "title" fallaciously; the "title" here is the title to the relief, not the title to the estate.

[LORD CHANCELLOR. That is, the title to the order for conveying the legal estate, not the title to the estate itself.]

Just so; that was the view the late Master of the Rolls took of the case.

[They referred to *Smith v. Duke of Beaufort*, 1 Ph. 209; 7 Jur. 1095, and the cases there cited; and to the case of *Chadwick v. Broadwood*, 3 Beav. 308, which was a suit by the present defendant.]

Bird, in reply. The other side rely upon the case of *Smith v. The Duke of Beaufort*, 1 Ph. 209, but we also accept the law as laid down in that case. There, there was an averment in the bill that certain documents, in the possession of the defendant, proved that there had been a variation in the tolls, and there was no positive denial of that in the answer; but in the present case there is a distinct denial of the averments in the bill. *Bolton v. The Corporation of Liverpool* proceeded upon this ground, that you shall not have discovery of the defendant's title unless it affirmatively proves the title of the plaintiff. In that case there was merely a general allegation that the defendants had no title, and that the documents in the possession of the defendants would prove that. That allegation was denied, and the documents in question were protected. That case was quite different from *Smith v. The Duke of Beaufort*.

[LORD CHANCELLOR. I do not see the distinction. Bolton did not claim tolls; he only claimed exemption from tolls, as did Smith in the other case.]

But in *Smith v. The Duke of Beaufort* there was the allegation of variation, and no denial of that fact. So in *Combe v. The City of London*, 4 Y. & C. 139; *Stroud v. Deacon*, 1 Ves. sen. 37; and *Kennedy v. Green*, 6 Sim. 6. In all those cases there was an allegation of a material fact—a charge that the discovery would prove that fact, and no denial of that charge. But if there be an absence of a sufficient allegation in the bill, or there be a denial of it in the answer, the defendant is protected. This case, therefore, is a pure question of pleading, and it is incumbent upon the other side to show in the bill a precise allegation that the production of the documents in our possession will prove the allegation of fraud; but there is no such allegation in the bill. If your Lordship's decision be against us, they can immediately amend their bill. As to the honesty of the defend-

Stainton v. Chadwick.

ant in getting the assignment of the legal estate, I submit that he did no more than what any prudent heir at law would be advised to do.

November 8. LORD CHANCELLOR. This case came before the court upon an appeal from an order of the Master of the Rolls, allowing certain exceptions taken to the defendant's answer; and the question is, whether, according to the practice of the court, the answer is open to those exceptions. It appears from the pleadings that Sir Andrew Chadwick who died intestate in the year 1768, was equitably entitled to considerable real estate, the legal estate being then outstanding in trustees for him; and the main question between the parties is, who was the heir at law of Sir Andrew Chadwick; the plaintiff insisting that Mrs. Law, the cousin of Sir Andrew, was his heiress at law, under whom the plaintiff claims to be entitled to that portion of Sir Andrew's estate which is in litigation in this cause; while on the part of the defendant it is insisted that one James Chadwick, and not Mrs. Law, was heir at law of Sir Andrew, and that the defendant is a legal descendant from that James Chadwick, and, in that character, is entitled to the litigated property.

It further appears, that in 1840 the defendant presented two petitions to this court under stats. 1 Will. 4, c. 60, and 4 and 5 Will. 4, c. 23, commonly called Sir Edward Sugden's Acts: one of those petitions prayed that it might be declared that one Samuel Horsey was a trustee of the premises therein mentioned for Sir Andrew Chadwick and his heirs, and that the heir of the said Samuel Horsey was then a trustee of the same premises for the petitioner as the heir at law of Sir Andrew Chadwick, and that the court would direct some person, in the place of the heir of the said Samuel Horsey, to convey the premises in such manner as the petitioner should direct; and the other petition prayed a similar declaration as to one William Compton, and the premises comprised in that petition. Orders of reference were made on these petitions, and the Master reported that the heirs of the trustees, in whom the legal estate had been vested, could not be discovered; and the Master also reported that the defendant was the heir at law of Sir Andrew Chadwick, and equitable owner of the estates which had belonged to him. Upon these reports an order was obtained by the defendant, directing a conveyance of the legal estate, and the defendant's solicitor was appointed to execute such conveyance, and which was accordingly done.

The bill alleges that the evidence and statements presented by the defendant to the Master, upon the faith of which the Master was induced to report, contrary to the truth of the fact, that the defendant was the heir at law of Sir Andrew Chadwick, and, as such, was equitably entitled to the property in dispute, were false and fraudulent, and consequently that the order for the conveyance of the legal estate to the defendant was obtained by fraud and imposition upon the court. The plaintiff alleges that, by means of the legal estate so obtained, the defendant, although a stranger to the family of Sir Andrew Chadwick, and destitute of all equitable title, has the control at law of the possession of the property, and that the plaintiff is thereby

Stanton v. Chadwick.

altogether precluded from legal remedy; and the bill prays a declaration that the plaintiff is equitable owner of the property in question mediately from Mrs. Law, and that the defendant is trustee of the legal estate for him, and may be decreed to convey it according to the plaintiff's appointment; and in the mean time, that the defendant may be enjoined from setting up, or in any manner using the legal estate.

The bill contains interrogatories calling for a discovery of various matters connected with the titles of both the plaintiff and defendant, but to which it is not material to advert, not being relevant to the point calling for decision upon the present appeal. But what is material to the present purpose is, that it also contains interrogatories addressed to the discovery of the alleged false and fraudulent evidence and statements, by which the order for the conveyance of the legal estate was procured. It is to all these interrogatories the defendant has refused to answer, and which refusal gave rise to the exceptions now before the court for judgment. There were several other exceptions, but they have been disposed of, and the appeal does not refer to them. It has been correctly said, during the argument, that the validity of the exceptions is a pure question of pleading; and having stated the outline of the case, I will now advert somewhat more particularly to the bill and answer.

The bill states the seizin of Sir Andrew Chadwick of the property in question, among other considerable real estate, with many details relative to the state of the title to the realty, and also to certain leases and underleases, not now necessary to be minutely stated. It further states that Sir Edward Chadwick died intestate in the year 1768, leaving Mrs. Law his heiress at law, and deduces the title from Mrs. Law to the plaintiff, and states that, by force of the plaintiff's equitable ownership, he has succeeded to the receipt of the rents reserved in the underleases of the houses in question, under which the assignees of the terms thereby granted were in the actual occupation of the houses, and that he continued down to Michaelmas, 1847, in receipt of such rents; and he insists that thereby he was, in point of law, in constructive possession of the premises by his tenancy, and entitled to the possession against them.

The bill then states that the defendant, in 1840, presented the two petitions before mentioned, and that the proceedings under them were all conducted *ex parte*, and led to the report and consequent conveyance of the legal estate to the defendant. He states many of these proceedings in detail, attaching the charge of falsehood and fraud to them; and that after having so obtained the legal estate, the defendant purchased the terms in the underleases before mentioned, and induced the actual occupiers of the respective premises to attorn to him, and so the defendant contends he obtained possession of the premises. The plaintiff also alleges that these underleases have since expired, and the right to actual possession of the houses has therefore reverted to him, but that the defendant retains the possession, and by force of the legal estate precludes the plaintiff from the effectual pro-

Stainton v. Chadwick.

secution of the legal remedies to obtain possession, which, except for such legal estate, he might enforce.

Two distinct heads of equity were, therefore, attempted to be raised by the bill. The one is, that the plaintiff is equitable owner of the property in question under Mrs. Law, who was the heiress at law of Sir Andrew Chadwick, and that the defendant, who has acquired the legal estate as from the trustees, in whom it was vested in trust for the equitable owner, now is seized of such estate as trustee for him, the plaintiff, and ought, therefore, to be decreed to convey such estate to him. The other head of equity is, that the defendant became such trustee by fraud and imposition upon the court, and is now using the legal estate, of which he is such trustee, inequitably and fraudulently against the plaintiff, who is the equitable owner, and therefore that the defendant ought to be restrained by injunction from such improper use of the legal estate. The interrogatories, which the defendant refused to answer, wholly relate to this second head of equity. The defendant, in his answer, asserts his own title as heir at law of Sir Andrew Chadwick, and denies that Mrs. Law was the heiress of Sir Andrew, and that the conveyances under which the plaintiff claims have vested the equitable estate of the property in question in the plaintiff.

It is admitted that Mrs. Law, and other claimants under her, have received the rents reserved by the underleases; but it is denied that such receipt is any evidence or any admission of the title to the reversion; and then, after answering some of the interrogatories contained in the bill, the defendant refuses to answer any of the interrogatories relating to the evidence stated and produced before the Master, and asserts that he could not give that discovery without disclosing the evidence of his own title; and the defendant denies that any of the evidence or statements produced before the Master were either false or fraudulent, or that they would establish or prove any of the allegations in the bill. The exceptions before the court relate to the interrogatories which the defendant has so refused to answer. The question therefore is, whether, regard being had to the whole state of the pleadings, including bill and answer, the plaintiff is entitled to a discovery of the alleged false and fraudulent evidence and statements, by means of which the conveyance of the legal estate is alleged to have been procured. In considering the plaintiff's equity to the discovery which the defendant refuses to give, it should be observed that the legal estate does give to the defendant the power and advantage which the plaintiff ascribes to it—in other words, it does control the actual possession of the property in question; because, however clearly the plaintiff may establish that Mrs. Law was the heiress at law of Sir Andrew Chadwick, and his derivative title under her, and however groundless the defendant's case, founded upon his pretension of being the heir at law of Sir Andrew Chadwick, may be, still the legal estate must prevail, and effectually control the possession of the premises; and it is upon this ground, and that such legal estate is alleged to have been obtained by fraud and imposition upon the court, that the plaintiff founds his equity to the discovery of

the circumstances constituting that alleged fraud and imposition, and of the evidence by which the bill alleges the fraud will be proved.

On the defendant's part it is contended, that, in the present state of the pleadings, the plaintiff has no equity which entitles him to the discovery which is withheld—first, because the right of such discovery is only consequential upon the plaintiff establishing that Mrs. Law, under whom the plaintiff claims, was heiress at law of Sir Andrew Chadwick, which fact is denied by the answer: secondly, that the alleged fraud in obtaining the order for the conveyance of the legal estate is, in general terms, also denied: thirdly, that the discovery sought for necessarily involves a disclosure of the evidence of the defendant's case and title as heir at law of Sir Andrew Chadwick. He therefore insists, that, the equity of the plaintiff being thus denied, he has no right to the discovery, which is consequential upon the title being either proved or admitted by the answer; and he further says, that, by the law of the court, if two parties are contending for the same property upon conflicting titles, neither is entitled to a discovery from the other of the evidence by which the case and title of such other is to be supported. The plaintiff replies to these objections, not by a denial of the principles or propositions contended for by the defendant, but by the assertion that all such propositions are subject to qualifications, which render them inapplicable to the present case—or, in other words, which remove them as grounds to exempt the defendant from giving the discovery prayed for by the bill.

It appears to me that the plaintiff has removed the defendant's objections to the plaintiff's right to the discovery sought for by the bill. There is no doubt, that where a discovery is sought in relation to matters in which the plaintiff has no right or interest but as consequential or resulting from a character or title attaching to the plaintiff, if such right and character are denied by the answer, and do not otherwise appear on the record, the plaintiff has no equity entitling him to the discovery. But it must also be observed, that although the interest in the subject-matter of the required discovery results from a given character and interest alleged in the bill, yet if, in the bill, it is properly averred that the required discovery will establish and prove the title and case which the plaintiff avers to exist, the defendant cannot, by generally denying the character and interest claimed by the plaintiff, withhold the discovery of the evidence in the possession of the defendant, which, it is averred, will prove the title and interest alleged to exist, and will also establish the fraud in the defendant by which the plaintiff's remedies will be affected or destroyed. It therefore seems that the nature and effect of the discovery which the plaintiff seeks is such as he is well entitled to, notwithstanding the defendant's denials, inasmuch as such discovery is required as the means of proving the matters which the defendant denies; as observed by Lord Redesdale, (p. 369, 3d ed.,) "Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery."

Ex parte Carter; In re Carter.

With respect to the defendant's further objection, that the discovery which he is required to give will compel him to disclose the evidence by which he, the defendant, is to establish his own case and title, it is to be remarked that the direct and immediate object of the discovery is not to compel a disclosure of the evidence upon which the defendant is hereafter to rely, although such an effect may be incidental or consequential to the discovery, but the immediate object and purpose is to prove the alleged fraud, by which the defendant has unduly obtained the legal estate, to the prejudice of the plaintiff; and although the general proposition, as stated on the part of the defendant, may be correct, that a litigant party has no right to the discovery of the evidence of his opponent's title, yet he has a right to a discovery of the evidence in support of his own title, and in proof of any fraud which has been committed to his injury; and the plaintiff's equitable right to a discovery of material evidence in support of his own case and title is not repelled, because, by exercising that equitable right, the defendant may be compelled to disclose the evidence in support of his, the defendant's, title and case. In the present case I think the plaintiff is entitled to the discovery, notwithstanding it may produce the consequence to the defendant which he alleges. Many authorities were referred to in the course of the argument, but it appears to me that none of them intrench upon the principles upon which I hold the plaintiff to be entitled to the discovery under consideration. In Mitford on Pleadings, (pp. 225-6, 5th ed.,) it is stated, that "in general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims." But the same author (p. 371) says, "Where a discovery is in any degree connected with the title, (that is, the title of the plaintiff,) it should seem that a defendant cannot protect himself by answer from making the discovery." The present case appears to me to fall within the principle thus laid down, and that such principles are not impugned by any of the authorities which have been cited. Upon these grounds the appeal must be

Dismissed with costs.¹

Ex parte CARTER; In re CARTER, a Bankrupt.²

December 5 and 12, 1851.

Bankruptcy — Annuling Adjudication — Commissioner's Jurisdiction — 12th, 104th, and 233d Sections of the Bankrupt Law Consolidation Act.

C. was adjudged a bankrupt in February, 1851, and on the 19th of the same month a duplicate of the adjudication was served on him. C. did not, within the time limited by the 104th section of the 12 & 13 Vict. c. 106, show cause to the court against the validity of the adjudication, and on the 28th February the adjudication was advertised in the Gazette. On the 19th March, C. presented a petition to the commissioner, praying that the petition for adjudication of bankruptcy, or the adjudication thereunder, might be annulled:—

¹ See *Follett v. Jefferyes*, 13 Jur. 465, 972.

² 15 Jur. 1142.

Ex parte Carter; In re Carter.

Held, reversing the decision, (15 Jur. 984; s. c. 7 Eng. Rep. 312,) that the commissioner had no jurisdiction to annul the adjudication after the time allowed by the 104th section for showing cause against the validity of the adjudication had expired, and that the petition so presented to the commissioner was not a proper proceeding to dispute the adjudication, within the meaning of the 233d section of the act; and that, although a petition of appeal to the Vice-Chancellor from the order on that petition was presented within twenty-one days from the date of that order, according to the 12th section, but more than twenty-one days after the advertisement of adjudication, the bankrupt was not entitled to have the adjudication annulled.

THIS was an appeal from an order of Knight Bruce, late Vice-Chancellor, annulling the adjudication of bankruptcy against the petitioner, (reported 15 Jur. 984; s. c. 7 Eng. Rep. 312.) The petitioning creditors appealed from that order, and the case now came on upon a special case, which stated as follows:—"The petition for adjudication of bankruptcy bore date the 15th February, 1851, and was filed by Josiah Dimmock, Timothy Dimmock, and Thomas Keeling, as petitioning creditors, against the bankrupt, in the Court of Bankruptcy for the Birmingham district, on the same day; and under such petition the bankrupt was, on the said 15th February, adjudged a bankrupt by one of the commissioners acting in the prosecution of petitions for adjudication of bankruptcy at the said court. The debt of the petitioning creditors, upon which alone such petition for adjudication was filed, and such adjudication as aforesaid was made, was a certain judgment recovered by the petitioning creditors against the bankrupt in the Court of Exchequer of Pleas at Westminster, for the sum of 65*l.* 7*s.* 9*d.*, which judgment was entered up on the 23d July, 1850. On the 26th July, 1850, the petitioning creditors issued a writ of *capias ad satisfaciendum*, directed to the sheriff of the county of Stafford, against the bankrupt, upon the said judgment, upon which writ the bankrupt was, on the 30th July, 1850, duly taken in execution by the said sheriff, and committed to the gaol of the said county, in which said gaol the bankrupt thereforth remained committed and confined, under the said judgment and execution, up to and at the time of the filing of the said petition for adjudication of bankruptcy, and the said adjudication thereunder, and thereforth until his discharge, as hereinafter mentioned. On the 19th February, 1851, a duplicate of the adjudication was duly served on the bankrupt personally, and on the same day the bankrupt was discharged from custody, and, under such discharge, was released from such custody by the said sheriff. The bankrupt did not, within the time allowed under the 104th section of the 12 & 13 Vict. c. 106, show cause to the court against the validity of the adjudication, and the court caused notice of the adjudication to be inserted in the London Gazette of Friday, the 28th February, 1851. The first public sitting in the bankruptcy was held on the 10th March, 1851, on which day the bankrupt surrendered. On the 19th March, 1851, the bankrupt presented his petition to the Court of Bankruptcy for the Birmingham district, and to John Balguy, Esq., a commissioner acting in the prosecution of petitions for adjudication of bankruptcy at the said court, praying that the said petition for adjudication of bankruptcy, or the said adjudication thereunder, might be annulled.

Ex parte Carter; In re Carter.

The said petition was heard on the 14th April, 1851, and on that day the said court ordered that the petition of the said bankrupt be dismissed. On the 23d April, 1851, the bankrupt presented his petition of appeal to his honor Knight Bruce, the Vice-Chancellor appointed and sitting in bankruptcy, praying that his honor would be pleased to order that the said order of the said Court of Bankruptcy for the Birmingham district, dismissing the bankrupt's petition, might be set aside, with costs, and that the said petition for adjudication, or the said adjudication, might be annulled, or that his honor would be pleased to make such other order in the premises as to his honor might seem fit. The last-mentioned petition was heard on the 10th May, 1851. At the hearing, it was contended on behalf of the petitioning creditors, first, that as the bankrupt did not, within the time allowed under the 104th section of the 12 & 13 Vict. c. 106, show cause to the court against the validity of the adjudication, his first-mentioned petition to annul the adjudication ought to have been presented to the said Vice-Chancellor, and not to the said commissioner; and, secondly, that as the said petition to the said Vice-Chancellor was not presented either within twenty-one days from the date of the order of adjudication, or within twenty-one days after the notice of the adjudication had been inserted in the London Gazette, such last-mentioned petition was presented too late, and, therefore, ought to be dismissed. But his honor (the said Vice-Chancellor) ordered that the adjudication of bankruptcy made against the said Thomas Carter on the 15th February, 1851, should be annulled, and the same was thereby annulled accordingly; and it was ordered that the respondents (the petitioning creditors) should pay to the said petitioner his costs of, and occasioned by, that application; and it was referred to William Vizard, Esq., an officer of the court, to tax such costs between the parties, if they differed about the same. The petitioning creditors insist that the said last-mentioned order is erroneous in matter of law, and ought to be reversed." The following are the sections and parts of sections of the 12 & 13 Vict. c. 106, upon which the question turned:—

Sect. 12. "That the court, in the exercise of its primary jurisdiction by virtue of this act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees, in their character of assignees, by virtue or under color of the bankruptcy; and also in any matter of bankruptcy whatever, as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the court; and also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not) where the court by virtue of that act has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided, and subject in all cases to an appeal to

Ex parte Carter; In re Carter.

such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy: provided always, that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the court, and be thereafter duly prosecuted, every such decision or order shall be final; and that every appeal shall be subject to such regulation in regard to deposit of costs as shall by any general rule or order to be made in pursuance of this act be directed."

The 101st section enacts, amongst other things, "that the court, under a petition filed by a creditor, shall, upon proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the person against whom such petition is filed, adjudge such person bankrupt."

Sect. 104. "That before notice of any adjudication of bankruptcy shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode, or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the court shall think fit, from the service of such duplicate, to show cause to the court against the validity of such adjudication; and if such person shall within such time show, to the satisfaction of the court, that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the court, the court shall thereupon order (in the form contained in schedule (U.) to this act annexed, or to the like effect) such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shown to the satisfaction of the court for the annulling of such adjudication, the court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette," &c.

Sect. 233. "That if the bankrupt shall not, (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an *action, suit, or other proceeding* to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect,

Ex parte Carter; In re Carter.

the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt," &c.

By the interpretation clause (sect. 276) it is enacted, "that the term 'court' and the term 'the Court of Bankruptcy' shall mean her Majesty's Court of Bankruptcy, and shall mean also and include any commissioner or commissioners of her Majesty's Court of Bankruptcy constituting and acting as a court under this act."

Swanston and *W. W. Cooper*, for the petitioning creditors, contended, that the only power which the commissioner had to annul the adjudication was under the 104th section of the act, and that to allow of such a proceeding as the present, by way of petition to the commissioner, after the expiration of the time limited by the 104th section, was not only to acquiesce in an anomalous proceeding, namely, a petition of appeal to the same judge who made the order appealed from, but also to allow the statute to be evaded as to the time limited by the 104th section: that the 12th section of the act gave no jurisdiction to the commissioner on the question of reviewing his decision upon the validity of the adjudication, but was entirely confined to matters of the administration of the estate of the bankrupt: and that the petition to annul the adjudication ought to have been presented in the first instance to the Vice-Chancellor. And they referred to the previous Bankrupt Act, 5 & 6 Vict. c. 122, s. 23, to show that the present statute had given a more extended time to the bankrupt to dispute his bankruptcy, the 23rd section of the previous act having only given him five days.

Daniel, for the bankrupt, contended that the 104th section had only a limited object—namely, to give the bankrupt the opportunity of protecting himself from the effect of the *advertisement* of the adjudication: that the bankrupt had the option whether he would take advantage of that section or not; and that, if he did not, the only effect was, that the advertisement would be inserted: that the question in the present case was, whether, within the true construction of this act of parliament, the bankrupt had, by presenting this petition to the commissioner to annul the adjudication, commenced a proceeding to annul the adjudication, within the meaning of the 233rd section, in proper time, and that this depended upon the 12th section of the act: that the words of the 12th section were as general as could be, and that unless that section confers the jurisdiction upon the commissioner, the legislature has, by the 1st section, repealing the previous statutes in bankruptcy, completely swept away all power anywhere to annul a fiat or adjudication in bankruptcy: that it has always been the undoubted right of a bankrupt to present a petition to annul, and that the 233rd section clearly contemplates some jurisdiction competent to annul the adjudication; but that unless that jurisdiction was conferred upon the commissioners by the first words of the 12th section, it did not exist anywhere, as there was no reservation of jurisdiction, in any part of the statute; and the Vice-Chancellor had no jurisdiction, except upon appeal from the commissioner. That the

Ex parte Carter; In re Carter.

other side contend that the appeal to the Vice-Chancellor ought to have been from the order of adjudication; but that that is not so, as the order of adjudication is *ex parte*.

[LORD CHANCELLOR. It being an *ex parte* order does not prevent its being appealed from.]

They also contend that the petition to annul was an appeal from the adjudication; but I submit that it was an original proceeding: it was a petition to annul a petition, and I submit that it was a proceeding within the meaning of the 233d section. *Ex parte Thorold*, 3 M. D. & De G. 285.

Swanston, in reply. There is no doubt that a petition to annul an adjudication is a proceeding within the 233d section, if it is presented to the proper tribunal; and it is equally clear, that a petition to annul an adjudication is a matter of appeal, for the Vice-Chancellor is called upon to declare that what the commissioner did was wrong. But this petition was not presented to the Vice-Chancellor within twenty-one days from the adjudication, or the advertisement of it, and was therefore too late as a matter of appeal. There is no foundation for the argument of the other side, that this was a petition to annul a petition; the only rational proceeding is, the annulling of the adjudication.¹

[LORD CHANCELLOR. Your argument is, that it would have been like presenting a petition formerly to annul the docket.]

Precisely so. The adjudication is a judicial act of the commissioner; and, by the 12th section, an appeal is given from all acts of the commissioners to the Vice-Chancellor. The Vice-Chancellor, therefore, had the power to annul, but the bankrupt has been too late in presenting his appeal. As a petition to the commissioner, it was not a "proceeding" at all within the 233d section, for it was a matter of appeal; if it had been a proper proceeding, the party would have been in time; but I submit that the commissioner's construction of the statute was right, in holding that it was *coram non judice*, and that the next proceeding before the Vice-Chancellor was too late.

LORD CHANCELLOR. The sole question in this case is, whether the petition presented to the commissioners on the 19th March was or was not a "proceeding" within the meaning of the act of parliament, taken before a proper tribunal, with a view of prosecuting the annulling of the adjudication. The act of parliament is not quite consistent in terms, for although it is clear that after the passing of that act there was an end of *fiats*, and the only foundation of the prosecution of the bankruptcy was the adjudication, still the word "fiat" is frequently found in the statute. Formerly there was a previous proceeding, called a docket, upon which a fiat issued under the Great Seal; but at present the first thing for a creditor to do is to present a

¹ The 233d section speaks of taking a proceeding "to dispute or annul the fiat, or the petition for adjudication."

Ex parte Carter; In re Carter.

petition to the commissioner, praying that the trader may be adjudged a bankrupt. The fiat, therefore, was at an end immediately upon the passing of that act, although from the language of that statute, in some parts, it might be presumed to continue. The adjudication by the commissioner is, therefore, the commencement of the proceedings in bankruptcy; and the adjudication by the commissioner is not now, as of old it was, a mere ministerial proceeding. The commissioner has now to draw a conclusion of law from matters of fact presented to him. That proceeding is *ex parte*; but as it is often found that *ex parte* proceedings work an injustice to absent parties, although subsequently vacated, therefore a remedy is sought to be given by giving an opportunity to the trader to come in, before the advertisement, to be heard to oppose the adjudication. Accordingly, by the 104th section of the act, it is provided that the trader shall have notice of the adjudication which the commissioner shall have previously pronounced; and such trader is allowed seven, or, according to circumstances, fourteen days, to show cause against the validity of the adjudication; and authority is given to the commissioner, if satisfied by the evidence produced by the trader that the evidence upon which he came to his previous conclusion did not warrant the adjudication, to annul such adjudication; and there would have been an end to the proceedings in bankruptcy, subject to the right of appeal from that decision; for it is to be observed, that it is not intended by the act of parliament that the decision of the commissioner should be final. The 12th section of the act gives very extensive jurisdiction to the commissioners. [His lordship here read the early part of that section.] "And also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not) where the court, by virtue of this act, has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided, *and subject in all cases* to an appeal to such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy."

Now, there is no doubt that a petition for an adjudication of bankruptcy is a matter over which the commissioners have jurisdiction; and this section, therefore, in defining their jurisdiction in general terms, expresses that which comprises a petition for adjudication; and having so impliedly given primary jurisdiction to the commissioners, it says, "subject in all cases to an appeal," &c. It appears, then, that the adjudication is within the jurisdiction of the commissioners, and, where jurisdiction is given to the commissioners, an appeal will lie to one of the Vice-Chancellors. That would show that there is no such evil necessarily arising as that of an appeal to the commissioner against his own decision. It has always been thought advisable, in legislating upon the bankrupt laws, to limit the time within which the bankrupt may contest the fact of bankruptcy to the earliest practicable period. The present statute follows in this same course of legislation; and with that view it provides, by the 104th section, in the first place, that, if the bankrupt thinks fit, he may contest the ad-

Ex parte Carter; In re Carter.

judication before the commissioner; and not only that, but he has, by the 12th section, a right of appeal against the decision of the commissioner to a Vice-Chancellor. Now, here, in the 104th section, is the first opportunity for the trader to resist the proceedings in bankruptcy before the advertisement. Suppose he does not do so, what is the next step the act has provided by which to limit the period within which the fact of bankruptcy shall continue to be doubtful as regards the bankrupt himself? The 233d section provides, that, unless the bankrupt shall, (being within the united kingdom at the date of the adjudication,) within twenty-one days after the advertisement of the bankruptcy, "have commenced an action, suit, or other proceeding to dispute or annul the *fiat*, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect," the Gazette shall be conclusive evidence of the bankruptcy.

Now, these being the general provisions of the present statute, what has the bankrupt in the present case done? He did not contest the commissioner's adjudication within the time limited by the 104th section; but some time afterwards (within the twenty-one days after the advertisement) he presented a petition to the commissioner, in which he prays that the said petition for adjudication of bankruptcy, or the said adjudication thereunder, may be annulled. It is said that the commissioner possesses original jurisdiction to adjudicate on the fact of bankruptcy; and it is contended for the petitioning creditor, that when he has done so, and the time for showing cause against the adjudication has expired, there is an end to his jurisdiction, and that the only mode of impeaching that decision is by way of appeal; and that, wherever an appeal is given, you must resort to the act of parliament to see what is the appellate jurisdiction; that there is nothing in this act to point to a second hearing by the commissioner, but that it is well known that the decision of the commissioner is open to an appeal to the Vice-Chancellor.

The question, therefore, is, what is the true character of the petition which was presented on the 19th March? Was it an original proceeding on the part of the bankrupt to annul the adjudication? The petitioning creditor says it had not that character, for that if it was finding fault with the judgment of a competent tribunal, it was in its nature an appeal; and that the nature of the transaction cannot be altered by changing its name; and that this is an attempt to have a review of the commissioner's adjudication after the expiration of the time limited by the 104th section, and even up to the twenty-one days after the commissioner's rejection of his petition, by calling it a petition of appeal from an original proceeding to annul. That the bankrupt was entitled to take the opinion of the commissioner on the facts which he might produce, as a reason for annulling the adjudication, is perfectly clear; but is not this also equally clear, that where the bankrupt wishes to avoid an appeal, by showing cause before the commissioner against the adjudication, that proceeding should be within seven days, or the extended time limited by the 104th section? I think the legislature has clearly expressed that; and that what he wants to do is what the legislature has said that he

Ex parte Carter; In re Carter.

should do, if at all, within that time. I think that the petition of the 19th March was, to every intent and purpose, a petition of appeal; and it appears to me that that petition was not presented to the proper tribunal, and that it was not competent to the commissioner to review his own decision after the time limited by the 104th section. The petition was certainly presented before the expiration of the twenty-one days after the advertisement, but that was a petition, as I have before stated, calling upon the commissioner to review his own decision. If that was a right proceeding, then the petition of appeal from the order dismissing that petition was also within the twenty-one days allowed by the 12th section; but if it was not a right proceeding, then there has been no proceeding taken within the twenty-one days after the advertisement, according to the 233d section.

The whole question, therefore, turns upon whether the petition, which was presented on the 19th March, was or was not a valid proceeding to dispute or annul the adjudication of bankruptcy. If the judgment of the commissioner was correct in holding that he had not then jurisdiction to annul the adjudication, then that petition, which was directed to complain of the adjudication, cannot be sustained. I am of opinion that the commissioner was right, and that the act of parliament would be evaded by the extension of the power beyond what the legislature intended, supposing the present order to stand. I think that it was not competent for the commissioner to annul the adjudication upon that petition; and therefore the appeal against the order made by the commissioner cannot be sustained, and the present order appealed from, which declared that it was competent to the commissioner to annul, must be reversed. Costs of the appeal to come out of the bankrupt's estate.¹

¹ The above case is a distinct authority upon the existing bankruptcy law, that a bankrupt having allowed the time for showing cause, under the 104th section, against the adjudication of his bankruptcy by the commissioner, to expire, the commissioner has no longer any jurisdiction over the question of adjudication; or, in other words, that when the seven (or fourteen) days mentioned in the 104th section are allowed by the bankrupt to expire without showing cause against the adjudication, the specific jurisdiction given to the commissioner by sect. 101 to adjudicate upon the fact of bankruptcy, and the general *primary* jurisdiction given to the court by the 12th section in all matters of bankruptcy, is exhausted. The three sections above alluded to, namely, the 12th, 104th, and 233d, afford another instance of the bungling manner in which modern legislation is managed; although the world might have expected better things of the "Bankrupt Law Consolidation Act," since it was known to have been launched from the hand of a noble and learned lord who has had very considerable, one may say, annual practice in bankruptcy law reform. From a careful perusal of those sections, it will be seen that one of two inconsistencies must exist, — either that the commissioner shall have jurisdiction to entertain a petition, the object of which is to reverse an order made by the commissioner upon a previous petition, which would be *appealing* from the decision of the commissioner to the same commissioner, which, perhaps, would be the least of the anomalies, but which the above decision declares cannot be done under the act; or there is an implied right in the bankrupt to commence a proceeding within twenty-one days after the advertisement, whereby he may annul the adjudication, although there does not exist any jurisdiction in bankruptcy which can entertain that proceeding. By the 12th section the bankrupt has an express right to appeal to the Vice-Chancellor (now the Lords Justices) from *all orders* of the "*court*," which means the commissioner, and such appeal must be entered within

Lodge v. Prichard.

LODGE v. PRICHARD.¹

July 28, 1851.

Evidence — Professional Confidence.

A bill was filed by one of two residuary legatees, to set aside the purchase by the executors of certain shares of a ship, which were part of the testator's assets. The defence was, that the purchase by the executors was made at the special desire of the residuary legatees, who sent their solicitor to the executors to overcome their objections to make the purchase. The defendants examined the solicitor to prove these facts. An objection being made to his depositions, they were suppressed, as being in violation of professional confidence.

A QUESTION arose at the hearing of this cause as to the admissibility of certain evidence. The bill was filed by one of the two re-

twenty-one days from the *date of the order*; and by the 223d section he has an implied right to commence an action, suit, or "other proceeding," within twenty-one days, not from the *date of the order*, but "after the advertisement in the Gazette," which, by the 104th section, must be at least seven days subsequent to the order of adjudication, unless by consent of the bankrupt. The only mode, as it appears to the reporter, of escaping from the latter of the two inconsistencies, would have been by assuming that a petition to the commissioner to annul the adjudication, after the advertisement, was a proper proceeding to annul the adjudication; for then there would be a proper bankruptcy jurisdiction to annul the adjudication after the advertisement, up to the full period of twenty-one days after the advertisement; but this is negatived by the above decision.

The difficulty which appears to exist upon this subject seems to the reporter to be as follows: The only section of the act which gives any jurisdiction to a Vice-Chancellor (now the Lords Justices) in bankruptcy, and that an *appellate* jurisdiction from the decision of the commissioner, is the 12th section; and, according to the express enactment of that section, unless the appeal be entered within twenty-one days from the *date* of any decision or order of the court, every such decision or order *shall be final*. This express enactment as to time cannot be altered or extended by the implied power of the bankrupt, under the 233d section, to commence a proceeding to annul the adjudication within twenty-one days after the advertisement. It might, therefore, easily happen that this right of appeal might actually expire before the advertisement was inserted in the Gazette, for there is nothing in the act that obliges the duplicate of adjudication to be served on the bankrupt within any particular time; therefore the period between the date of the order of adjudication and serving the duplicate, plus the seven (or fourteen) days before the advertisement, may exceed twenty-one days; and in all cases where the bankrupt does *not* show cause, under the 104th section, against the adjudication, there is no order or decision that can possibly be appealed from but the order of adjudication; and the appeal must be entered, according to the 12th section, within twenty-one days from *its date*. But then the 233d section implies a right in the bankrupt to commence a proceeding at any time within twenty-one days after the advertisement, for the purpose of annulling the adjudication, but it does not point out any particular court which is to have the jurisdiction. The above case did not call for a positive decision as to whether, assuming that a petition to annul had been presented to the Vice-Chancellor after the twenty-one days from the date of the adjudication, but within twenty-one days after the advertisement, the Vice-Chancellor would have had jurisdiction to annul the adjudication; but, for the reasons already stated, the reporter ventures, with much diffidence, to submit, that the Vice-Chancellor could have no jurisdiction in the matter, unless the appeal to him happened to have been entered within twenty-one days from the *date* of the order appealed from; for it is clear, that under this act of parliament the Vice-Chancellor has only an *appellate*, no original, jurisdiction in bankruptcy. Where, then, exists the jurisdiction for annulling the adjudication up to the full period of twenty-one days after the advertisement?

¹ 15 Jur. 1147.

 Lodge v. Prichard.

siduary legatees of a testator against the executors, praying the usual accounts, and that a purchase by the executors of certain shares in a ship, which belonged to the testator's estate, might be set aside. The case made by the defendants was, that the residuary legatees had themselves endeavored to sell the testator's shares in the said ship, but not succeeding, had requested the executors to become the purchasers, which they declined, upon the ground that trustees could not lawfully purchase the trust property from their *cestuis que trust*: that in order to remove this objection, and to induce the executors to purchase the shares, the residuary legatees instructed their solicitor to wait on the defendants: that he did so, and produced a document signed by the residuary legatees, whereby they expressed their willingness to sell the shares to any person at the sum then proposed;

It is clear that the act of parliament nowhere, in express terms, gives this jurisdiction to the commissioner, or to any other court; but by the 12th section it enacts, "that the court, in the exercise of its *primary* jurisdiction by virtue of this act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating" &c. Then follow matters purely touching the administration of the bankrupt's estate; and then the section goes on — "and also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not) where the court, by virtue of this act, has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided." Now, supposing that the 104th section had been omitted from the act, would the commissioner, under these general words of the 12th section, have had jurisdiction to entertain a proceeding, under the 233rd section, to annul the adjudication? In *Ex parte Thorold*, 3 M. D. & De G. 285; 1 Ph. 239; 7 Jur. 1003, Lord Lyndhurst decided, that a petition to the Court of Review by a bankrupt to annul the fiat, after the advertisement, was a "proceeding," within the meaning of the 24th section of the 5 & 6 Vict. c. 122, which was in the same words as the 233rd section of the present act; but at that time the fiat was the act of the Great Seal, and the commissioner had no jurisdiction over it. Now the *adjudication* is the act of the commissioner, and the superior court has no jurisdiction over it but an appellate one. The reporter ventures to submit, that the words of the 12th section are extensive enough to include that jurisdiction, and that the only objection to the possession of such jurisdiction is the occurrence of the word "*primary*" in the first line of the section; and that it would not be doing much violence to the term "*primary*" by holding that the commissioner has jurisdiction to entertain a petition of a bankrupt to annul the adjudication after advertisement, where the bankrupt had not attempted to *show cause*, under the 104th section, against the adjudication, for then the petition would be the *primary* step by the bankrupt to annul. If, then, this jurisdiction would have been possessed by the commissioner had the 104th section been omitted from the act, the reporter submits that the argument, *expressio unius est exclusio alterius*, cannot be deducted from it, as that section was dealing with a peculiar matter. Enough has been said, however, to show, that unless this construction can be put upon the 12th section, there exists in the bankrupt a right to commence a proceeding, under the 233rd section, to annul the adjudication, at a time when there is no jurisdiction in *bankruptcy* to entertain that proceeding; and he must therefore resort to the other means mentioned in the 233d section for disputing the adjudication — namely, by action at law or suit in equity. The law, therefore, calls for further speedy amendment.

The reporter begs to observe, that in the argument of the above case the attention of the Lord Chancellor was not drawn to the circumstance so much commented on in this note — namely, that the utmost extent of jurisdiction given by the act to the Vice-Chancellor was to entertain an appeal from the order of the commissioner, if entered *within twenty-one days after the date of the order*; whereas the bankrupt has, by the 233rd section, an implied right to commence a "proceeding" at any time *within twenty-one days after the advertisement* to annul the adjudication.

Lodge v. Prichard.

and that the solicitor at length succeeding in removing the objections of the executors, and satisfied them that the sale could not be impeached, being authorized by the only persons interested in the shares; and that by these means the executors were induced to become the purchasers. To support this defence, the solicitor who had negotiated the sale was examined, and gave evidence as follows:—

“On or about the 16th April, 1838, at the instance and request, and as the professional adviser of the plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, I called upon and had an interview with the defendants Richard Williams Prichard and William Rushton Coulbourn respecting the sale to them of the shares then late of the said testator, Adam Lodge, in the ship *Ganges*; such request was conveyed to me by a letter from the plaintiff, Adam Lodge, as follows:—

“Woodford Park, Saturday evening.

“My dear Sir,—Mr. Hindle is strongly of opinion that your professional and friendly intervention might be serviceable in a course of proceeding at Liverpool, rendered expedient by entire want of confidence in the executors of my late father, and the person acting as their solicitor, who is by a variety of circumstances disqualified from furthering the interest of my brother and myself. Could you accompany us to Liverpool, ‘special,’ on Monday? Mr. Hindle intended to proceed there, but is prevented by an access of gout.

“Yours very truly,
“A. LODGE.”

“Bland Walker, Esq.

I was authorized to act on behalf of the plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, as their professional adviser. I had for ten years and upwards before that time been well acquainted with the plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, and also with their sister, Mrs. Hindle, but I had not before that time been acquainted with the defendants Richard Williams Prichard and William Rushton Coulbourn, or either of them. I did at such interview with the said Richard Williams Prichard and William Rushton Coulbourn as aforesaid, and on behalf of the said Adam Lodge and John Lodge Ellerton, endeavor to induce the said Richard Williams Prichard and William Rushton Coulbourn to become the purchasers of the shares late of the said testator, Adam Lodge, in the ship *Ganges*. It was suggested at such interview, but by whom I do not now recollect, and it was determined in consequence thereof, that the said plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, should take steps to satisfy themselves as to the value of the said shares. I acquiesced in the propriety of such suggestion; and I know that the plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, consulted Mr. Daniel Buchanan, of Liverpool, broker, and Mr. Henderson, of Liverpool, merchant, as to the value of the said ship. I afterwards, on behalf of the said plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, endeavored to negotiate a sale of the said testator's shares in the said ship to the said Richard Williams Prichard and William

Lodge v. Prichard.

Rushton Coulbourn, but the said Richard Williams Prichard and William Rushton Coulbourn expressed a reluctance to enter into a negotiation, on the ground that it would in effect be a purchase by trustees from their *cestuis que trust*, which a court of equity would not sanction. I endeavored to remove such objection, and to satisfy them that such sale, if effected, could not be impeached, inasmuch as the said Adam Lodge and John Lodge Ellerton were the only persons interested in the shares of the said ship, and they were both of full age, and one of them a barrister at law; and I was also there as their professional adviser. The defendants Richard Williams Prichard and William Rushton Coulbourn still persevering in their objection, in order to remove the same the following paper writing was prepared:—

Exhibit C.

“ We, John Lodge and Adam Lodge, being the residuary legatees of the personal estate of our late father, Adam Lodge, Esq., do hereby consent to an absolute transfer of his interest in the ship *Ganges*, to any person or persons, for the sum of 1200*l.* in cash; such interest to vest in the purchaser as and from the termination of her last voyage. The purchase-money to be paid into the bank of Messrs. Moss & Co. in your names, as executors of Mr. Lodge. As witness our hands this 19th day of April, 1838.

“ JOHN LODGE.

“ ADAM LODGE.

“ To Messrs. Prichard and Coulbourn.”

It is in my own handwriting, and the names ‘John Lodge’ and ‘Adam Lodge,’ thereto subscribed, are in the respective handwritings of the said John Lodge and Adam Lodge. The said paper writing was, to the best of my recollection and belief, originally drawn up by the plaintiff, Adam Lodge, and it was copied or put into its present form by myself, and it is the same paper writing or document which I delivered to Richard Williams Prichard and William Rushton Coulbourn. John Lodge, who subscribed his name to the same paper writing or document, is the same person as John Lodge Ellerton in the pleadings of this cause named. I said, on delivering the said paper writing to the said William Rushton Coulbourn, ‘Now I think you are safe, and the transaction being in my opinion unimpeachable, you may either keep or sell the shares to whom you like;’ and the said Richard Williams Prichard and William Rushton Coulbourn thereupon agreed to take the said shares at 1200*l.*, the sum mentioned in the paper writing.”

Baily, Dickinson, and Selwyn, for the plaintiff, objected to this evidence, and sought to suppress it on the grounds that the witness was, at the time of the transactions to which his depositions referred, the solicitor of the residuary legatees, and therefore that it was a breach of professional confidence to produce the letter containing his authority to act; that the interview to which he deposed was in consequence of that letter; that he ought not to have verified the signature of the plaintiff to the document authorizing the sale.

Wright v. Barlow.

Bacon and *Tillotson*, on behalf of the executors, argued, that the letter from the residuary legatees, giving authority to the solicitor to act, was not material; and that a solicitor of one party in a suit was bound to give evidence of statements made by himself to adverse parties by the directions of his client.

In the course of the argument the cases of *Gainsford v. Grammar*, 2 Camp. 9; *Ripon v. Davies*, 2 Nev. & M. 310; *Griffith v. Davies*, 5 B. & Ad. 502; and *Turner v. Railton*, 2 Esp. 474; and 1 Ph. Ev. 776, ed. 1843, were referred to.

Knight Bruce, V. C., said that he was of opinion that in this particular case the evidence of the solicitor, as to the document marked C, was so associated, blended, and united with the professional confidence existing between him and his employer—it was so infected, if he might use the expression, with professional confidence, that he could not select any part of it, and depose as to that. The whole was affected by the original confidence. If his honor was the only judge who in any event would have to decide upon the facts of the case, the admission or rejection of the evidence would be of very little importance. He agreed that parts might be selected which might be free from the objection, if they could be separated, but he thought they were not with propriety separable. The whole evidence must, therefore, be rejected.

WRIGHT v. BARLOW & others.¹

November 13, 1851.

Practice—Dismissal of Bill against useless Defendant—Costs.

A bill was filed against several defendants for the recovery of certain small tithes; one of these defendants being a quaker, his solicitor applied to the plaintiff's solicitor to dismiss the bill against him, and to proceed to recover the tithe from him under the 3 & 4 Will. 4, c. 74. The plaintiff consented, on condition that the defendant would admit the plaintiff's title to the tithe, so as to bring the case within the statute. The defendant prepared an answer not admitting the title. Subsequently by arrangement, the answer was revised, so as to admit the plaintiff's title. Proceedings were then taken against the defendant to obtain a warrant of distress under the above statute. Before the magistrates the defendant again refused to admit the plaintiff's title, but his admission in his answer being read, the warrant was granted. The plaintiff now moved to dismiss the bill against this defendant, without costs, and that the defendant might pay the costs of the motion:—His honor made an order, dismissing the bill, without costs, but refused to give any costs of the motion.

Where a suit becomes useless against a particular defendant, it is a laudable course for the plaintiff to dismiss the bill against him, and he may incur censure if he brings the suit to a hearing without doing this.

A MOTION was made in this case that the plaintiff's bill might stand dismissed against a defendant, Samuel Jesper, without costs,

¹ 15 Jur. 1149.

Wright v. Barlow.

and that Jesper might pay the costs of the motion, and consequent thereon. The bill was filed to recover certain small tithes which were in arrear, the real object being to establish the right to such tithes. Jesper being a member of the society of friends, his solicitor applied to the plaintiff's solicitors to inform them of that fact, and to request that the bill might be dismissed as against him, and proceedings taken to recover the tithes under the statutes applying to such a case. This was consented to, on condition that Jesper, by his answer, should admit the plaintiff's title to the tithes in question. The draft answer of Jesper, as at first prepared, referred to and claimed the benefit of the stat. 5 & 6 Will. 4, c. 74, but, in the opinion of the plaintiff's counsel, it denied the plaintiff's title to the tithes. By arrangement the answer was altered, and as altered contained a statement that the defendant did not, nor had he ever in any way, questioned or disputed, the actual title of the plaintiff to the tithes sought to be recovered from the defendant; but that the defendant was a member of the society of friends, called quakers, and that the value of the tithes sought to be recovered was under 50*l*., and their yearly value was under 10*l*.; and the defendant insisted that he was entitled to the protection of the act of the 4 & 5 Will. 4, intituled, "An Act for the more easy Recovery of Tithes," and of the several acts of parliament therein referred to. The plaintiff's solicitors, in some further correspondence which passed, offered to allow the answer to be filed on signature only, if Jesper would undertake not to dispute the plaintiff's title in proceedings against him before the magistrates. Jesper refused to give such undertaking. The 4 & 5 Will. 4, c. 74, after reciting that by the 7 & 8 Will. 3, c. 34, provision was made for the recovery of great and small tithes (not exceeding the amount of 10*l*.) due from quakers by distress and sale under the warrant of two justices, and reciting certain other acts extending these provisions to any amount not exceeding 50*l*., enacted, that from and after the passing of this act "no suit or other proceeding shall be had or instituted, in any of her majesty's courts in England or Ireland now having cognizance of such matter, for or in respect of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever, of or under the yearly value of 50*l*., withheld by any quaker either in England or Ireland, but that all complaints touching the same, if in England, shall be heard and determined only under the powers and provisions contained in the 7 & 8 Will. 4, c. 34, and in the 53 Geo. 3, c. 127; provided always, that nothing hereinbefore contained shall extend to any case in which the actual title to any tithe, oblation, composition, modus, due, or demand, or the rate of such composition or modus, or the actual liability or exemption of the property to or from any such tithe, oblation, composition, modus, due, or demand, shall be *bonâ fide* in question." On the 19th July last, Jesper was summoned before the magistrates under the provisions of the above act, and he on that occasion denied or refused to admit the title of the plaintiff to the tithes in question, but on the above passage from his answer having been read, the magistrate granted a warrant for distress against him.

Wright v. Barlow.

The plaintiff now moved to dismiss the bill against Jesper, without costs; and the only question in dispute was, who should pay the costs of this motion.

J. Russell and *Renshaw*, for the plaintiff, contended that when the bill was filed the plaintiff did not know that Jesper was a quaker; and that he first denied the plaintiff's title by his draft answer, which gave this court jurisdiction; and then, having admitted it by his revised answer, he again denied the title before the magistrates: that these circumstances authorized all the proceedings taken on behalf of the plaintiff against this defendant; and the plaintiff being driven to make this motion, the defendant should pay the costs of it. They cited *Sevill v. Abraham*, 8 Beav. 598, and *Hennet v. Luard*, 12 Beav. 479.

SIR J. PARKER, V. C., said that it was a laudable course, when the suit was no longer necessary against a particular defendant, to attempt to dismiss the bill against him, citing *Knox v. Brown*, Cox, 359. His honor said that there were cases in which the plaintiff had incurred censure for bringing a suit to hearing without doing this.

Schoyn, for the defendant, denied that there had ever been any dispute of title within the meaning of the act referred to; if there had been, the magistrate could not have made the order. Quakers had a conscientious scruple against admitting the right of any one to take tithes. In that sense only had this defendant disputed the right. This was the very difficulty which the act was intended to meet. The plaintiff had no right to file this bill. That is a question in the cause; therefore the answer could only be looked to for evidence upon it; a question in the cause cannot be decided on affidavits. The statement in the answer is conclusive. He cited *Askew v. Milington*, 9 Hare, 65; s. c. 4 Eng. Rep. 165.

Russell, in reply, said that every title is, in fact, disputed which a defendant by his conduct puts the plaintiff to prove against him. This was done here by the original draft answer of the defendant Jesper.

After some discussion the original draft of the answer was handed up to his honor, who looked through it, and said that he considered that it put the plaintiff to proof of his title.

SIR J. PARKER, V. C. The plaintiff's right was disputed by certain occupiers in the district, one of whom was Jesper. Jesper puts him to prove his title; but the defendant has now put in an answer, putting an end to the dispute, and which, it is said, prevents the court from making an order against him at the hearing for payment of tithes. Such a suit ought not to go on against this defendant; and the question is, how he ought to be dealt with on the present occa-

Ex parte Woolmer.

sion — whether the plaintiff is entitled to have the bill dismissed, and how the costs in the case are to be dealt with. The plaintiff says that he was compelled to file the bill against Jesper because his title was disputed. Jesper says that he never did dispute the title, but all he said was, that being a quaker, he did not admit that anybody was entitled to receive tithes. I do not think that Jesper's view of the case is supported by the draft answer to the bill which was first prepared, nor do I think that the affidavits bear out that view of the case. I think that Jesper did dispute the plaintiff's title on grounds different from those on which any quaker would dispute that a tithe-owner was entitled to receive tithes. It appears to me, that, in the first instance, Jesper did dispute the plaintiff's title, and that his answer has now put an end to the dispute; and that being so, I think the case comes within the principle of those cases in which the court, on the plaintiff's motion, has dismissed the bill against the particular defendant, without costs. I do not think that I can give the costs of the motion, for the answer substantially puts the plaintiff to prove his title. *Dismiss the bill, on the plaintiff's application, without costs.*

*Re THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848; Re THE DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY; Ex parte WOOLMER and Others.*¹

December 13, 1851.

Petition to discharge Winding-up Order.

In June, 1849, an order was made to wind up the above-named company under the above act, upon representations that the company was provisionally registered, and that shares had been applied for, but before any were allotted it had been deemed advisable to abandon the undertaking; that some shares had afterwards been allotted, on a few of which a trifling sum had been paid; that there were numerous contributories; that no deed of settlement had been executed; that large debts had been incurred, to which some of the persons liable had contributed something, but others had not; and that the company had ceased to carry on business. A petition was now presented to discharge this order, on the grounds that the association, by the law as it now stands, was not within either of the Winding-up Acts, because its object was only to form the company, which had never been effected, and because there were only seven persons who would now be considered contributories, one of whom was out of the jurisdiction:—

Held, that the company was within the act of 1848, and the petition must be dismissed, with costs.

In the month of June, 1849, Lieutenant-Colonel Ellis presented his petition in this matter, stating that in August, 1845, an association or partnership was formed by a number of persons resident in England, for the purpose of making and maintaining a railway therein mentioned, to be called "The Direct Exeter, Plymouth, and Devonport Railway," for the conveyance of passengers and merchan-

Ex parte Woolmer.

dise, and that the said company or association was duly registered in August, 1845, and that shares were applied for in the said company, but before any allotment of shares took place, it was deemed advisable by some of the provisional committee to abandon the undertaking altogether, and some of the provisional committee accordingly retired from the said undertaking: that some allotment was afterwards made, but no deed of settlement was ever executed, and the undertaking was abandoned: that some few of the persons amongst whom shares were so allotted paid a trifling sum of 2s. or 3s. in respect of each share so allotted to them, towards the expenses of the undertaking: that the capital of the said company was proposed to be the sum of 1,000,000*l.*, divided into 40,000 shares of 25*l.* each, with a deposit of 2*l.* 12s. 6*d.* per share: that the provisional committee was originally intended to comprise a great number of persons, whose names and addresses were set forth in the said petition: that many of such persons never acted as such provisional committee-men, but others of them, together with the petitioner, did become, in fact, the actual provisional committee of the said intended railway company: that the provisional committee incurred large debts and liabilities in and about the formation and prosecution of the objects of the said company, many of which, and to a large amount, were then outstanding: that the petitioner, Ellis, was a member of the provisional committee of management, and thereby became a contributory of the company, within the meaning of the Joint-Stock Companies Winding-up Act, 1848: that the several other members of the said provisional committee thereby became also contributories: that Ellis had been sued for debts incurred by the said provisional committee in the prosecution of the objects of the said company or association, which debts he had paid to an amount far beyond his just proportion of the expenses and liabilities of the said company or association, and that actions were then pending or were threatened against Ellis for other debts of the said company: that some of the provisional committee had not paid or contributed any sum of money towards the debts and liabilities of the said company, and absolutely refused so to do, and that others had contributed an inconsiderable sum only towards such debts and liabilities, and that no sufficient means existed, except under the powers conferred by the said Joint-Stock Companies Winding-up Act, to compel a due contribution from such of the said contributories as had not paid any such contribution, or an insufficient amount; and that various questions would arise in winding up the affairs of the said company, which could only be settled under the provisions of the said act: that the said company or association had long ceased to carry on business, and the secretary and clerks were discharged, and its place of business abandoned, but that the company had never been dissolved, or its affairs wound up. The said petition prayed that an order absolute might be made for the dissolution and winding up of the company under the act of 1848, and for the usual reference to the Master to wind it up accordingly.

Upon this petition, supported by affidavits, an order, dated the 8th June, 1849, was made, referring it to the Master in rotation to wind

Ex parte Woolmer.

up the company. Under this order some proceedings were taken in the Master's office. The official manager had in the first instance inserted in the list of contributories the names of all the allottees of shares, and of the provisional committee-men; but it having been since judicially declared that allottees of shares, and provisional committee-men as such merely, are not contributories, all were afterwards struck out, except a few members of the provisional committee, whose names were retained on account of their having attended a certain meeting of the committee held on the 31st December, 1845. Three of the members of the managing committee now presented their petition, stating the above facts, and that the managing committee consisted only of seven persons, one of whom was in Canada; that the provisional committee-men whose names were retained on the list of contributories had appealed against such retention; that the Master had made a call upon these persons to defray the expenses of the proceedings before him; that the petitioners had each paid about 600*l.* in discharge of the debts of the intended company; that one action only was pending against one of the committee of management; and that the remaining debts amounted altogether only to 1000*l.*; and the petition prayed that the order of the 8th June, 1849, might be discharged, or that all proceedings thereunder might be stayed.

Bacon and Terrell, for the petition, said, that if the law, as to the liability to contribute, had been in 1849, as it is now settled, the order sought to be discharged would never have been made. The list of contributories would, under the present law, be reduced to the seven members of the managing committee, one of whom was in Canada. This was no company or association under either of the Winding-up Acts. The petitioners could not make these objections in 1849, because the law was not then so understood.

[Sir J. PARKER, V. C. It turns out that what has been done in the Master's office is fruitless, except that costs have been incurred.]

Yes; but those costs ought not to be paid by persons who are only liable for the expenses of endeavoring to form the company. There were not a sufficient number of contributories to bring the matter within the act of 1848, under which the order was obtained. Then the order was not in form, an order to wind up this association, supposing it within the act, but to wind up the company which was then projected, but which had never been formed, but was about to be formed only. If the benefit of the amended act were claimed, one of the seven members of this association was in Canada, and the Master could not have served a notice upon him, as he must have done under the act, before he could put his name on the list. There were, therefore, in fact, only six contributories, and accordingly the association was not within either of the acts. *Besley's case*, 2 Mac. & G. 176; s. c. 4 Eng. Rep. 149; *Carmichael's case*, 17 Sim. 163; s. c. 1 Eng. Rep. 66. The real matter in issue, no doubt, was, who were to pay the costs which had been incurred in the Master's office in this matter; but it would be very unreasonable to make these seven gentlemen pay

Ex parte Woolmer.

these costs, especially if the winding-up order had been originally improperly made.

Roxburgh, for the official manager, asked for the costs incurred under the winding-up order.

[Sir J. PARKER, V. C., said that he had heard no reason for discharging the order, if the company were within the act of 1848.]

He referred to *Upfill's* case, 2 H. L. C. 693; s. c. 1 Eng. Rep. 13; *Re The Chepstow and Forest of Dean Railway Company*, 18 Law J. Rep. (N. S.) Chanc. 70; and the observations made by Lord Cottenham in his judgment in *Besley's* case, to the effect that this company was within the act of 1848.

Malins and *Daniel*, for Colonel Ellis, said that the case was clearly within the acts of 1848 and 1849: the latter act included associations of not less than seven persons, and was retrospective and declaratory. They referred to the cases of *Ex parte Barker*, 5 Railw. Cas. 594; 1 Mac. & G. 83, and *Beardshaw v. Lord Londesborough*, 18 Law J. Rep. (N. S.) Chanc. 76.

W. M. James, Karlake, and R. R. Dean, for other parties.

Bacon, in reply, said, that although in *Besley's* case the company was held to be within the act of 1848, it did not follow, that if the court had been told that there were only seven members, they would have so held. This order had been obtained on a representation that there were a large number of members, and that not being so, the order ought now to be discharged.

Sir J. PARKER, V. C., said that he considered himself bound by the authorities which had been cited, and which included this company within the act of 1848. If that were so, how did the petition stand? This order was obtained in June, 1849, by parties who represented that a large number of persons were jointly liable with themselves to the claims of creditors. The present petitioners knew of what was going on, and would have availed themselves of the benefits of that order, if benefits there had been. An investigation of the law of the case, and of the facts, had shown that the number of those jointly liable was very small, and a considerable amount of costs had been incurred. That could be no reason for discharging this order. If there were grounds upon which they could throw their liability on others, those grounds were open to them; but they could not come here to discharge this order, or stay proceedings under it. There must be no order on this petition.

Petition dismissed, with costs.

Soltan v. De Held.

SOLTAU v. DE HELD.¹

November 25, 1851.

Practice — Motions.

Where several counsel state that they have respectively pressing motions to make, the court calls on the senior counsel.

Where notice of motion has been given for a certain day, that motion does not thereby obtain precedence on that day:—

Semble, on the last day of term, only unopposed motions by the outer bar take precedence.

This was the last day of term.

Malins rose to move in this case, according to notice given, by special leave, for this day, stating at the same time that his motion was of a very pressing nature.

Stuart and *Rolt* (as seniors to *Malins*) objected to his moving out of his turn, and argued that the leave given to move gave a motion no precedence, and that they had also motions of a pressing nature.

Malins contended that where a counsel stated that he had a motion to make which the interest of his client required to be made immediately, the court would give so much credit to that statement as to allow him to open the case, in order that the court might judge as to its urgency; and proceeded to state that his motion was for the purpose of restraining the ringing of certain bells at Clapham, which were an intolerable nuisance to his client.

Bagshawe, on behalf of the junior bar, claimed his right to move, it being the last day of term.

Rolt asked the court to determine the question, as to whether counsel could move out of turn.

Sir R. KINDERSLEY, V. C. I believe the rule to be this, that of course any motion which seeks to restrain that which, if not restrained, would produce irremediable mischief, or what is tantamount to irremediable mischief, has precedence, but not over all motions of that nature. There may then be a conflict, until the court knows what the motion is about, which it cannot, and therefore must trust to counsel to state whether the motion is, in his judgment, so extremely pressing; then another counsel may rise, and say he has a motion equally pressing. I think, then, that the court has no means of hearing what all the motions are about, and then saying it will pick out that which involves the greatest mischief. If each of two or more counsel represent that each motion is more pressing than

¹ 15 Jur. 1151.

In re The Imperial Salt and Alkali Company.

another, the court can only give precedence to seniority. As to the notice of motion, the reason why leave was given was on the representation that the necessity was so great that there ought to be some despatch; and certainly, with some reluctance, I did allow the notice of motion to be given, stating, at the same time, that I must judge whether it was right to come on to-day. I did say I must consider when it comes on, but *non constat* that because leave was given the motion has a right to be heard to-day. I perceive that the notice of motion is like any other to be made to-day, or so soon after as counsel could be heard. Suppose a notice of motion to stay waste, such as cutting down timber, that might claim precedence; but I cannot say that because a nuisance is great and continued, that that would be a reason. I have no other alternative but to call upon the junior counsel to move their unopposed motions, unless it is stated that there are such pressing motions that they must come on. I must then call on the senior counsel having such a motion. It seems to me, I must confess, that even unopposed motions behind the bar yield to pressing motions.

Bagshawe observed that the junior bar would then lose their privilege, as there would always be pressing motions.

Sir R. KINDERSLEY, V. C., stated that on that day he had, in the morning, gone round the outer bar, and asked if any gentleman had any unopposed motion to make.

Malins then stated that the terms of the motion in his case were arranged, and that the motion would not occupy any length of time.

Stuart stated that he had also a motion, the terms of which were arranged, and proceeded to make that motion.

Malins then moved in this case, and after a short discussion with *Bagshawe*, who appeared on the other side, the terms were arranged.

Unopposed motions behind the bar were then taken.

*In re THE IMPERIAL SALT AND ALKALI COMPANY; Ex parte SLATTERY.*¹

November 25, 1851.

Winding-up Act, 1848—Right of Contributories to attend Proceedings in the Master's Office.

A contributory who has applied under Section 38, of the Joint-stock Companies Winding-up Act, 1848, has a right (but at his own expense) to be served with notice of, and also to attend, all meetings in the Master's office in relation to the winding up of his company;

¹ 15 Jur. 1163. *Ex relatione* Mr. Bigbie.

In re The Imperial Salt and Alkali Company.

even when there is strong ground for suspecting that his presence there may be mischievous to the estate.

Seem, per Knight Bruce, L. J., that, in a suit, a party to the suit would, under such circumstances, be liable to be excluded.

THIS was an appeal by the official manager of the Imperial Salt and Alkali Company against a decision of Sir J. Parker, V. C., (reported 15 Jur. 1053; s. c. *ante*, 49). Mrs. Slattery was a contributory to this company, and had applied, under sect. 38 of stat. 11 & 12 Vict. c. 45, to have notice, at her own expense, of all meetings, &c., in the Master's office, which the Master (Tinney) had acceded to, and ordered by an order under his hand of the 23rd April, 1851. The property being about to be put up for sale by auction, a meeting was to be held for fixing the reserved bidding, at which Mrs. Slattery claimed a right to be present by herself or her solicitor. This the official manager opposed, alleging that her solicitor was also employed for a person who intended to bid at the approaching sale, and that it would be very detrimental to the sale, and unfair to the general body of bidders, if one of them were, under cover of this section, to obtain an approximate knowledge of the reserved bidding, or of the evidence on which that bidding (which it was admitted would be kept secret by the Master) was founded. Master Tinney accordingly refused to allow Mrs. Slattery's solicitor admittance to the meeting, on the ground of the danger to the sale; but the Vice-Chancellor thought, that under the act there was no discretionary power, but that all contributories, on making application, had a right to attend.¹

¹ Sect. 34. "The official manager, *with or without notice to any contributory*, shall, without the necessity of any proposal in writing, take the directions of the Master from time to time with reference to all proceedings necessary to be done or taken in order to the complete and effectual winding up of the affairs of the company, and it shall be lawful for the Master to give such directions accordingly."

Sect. 27. "Upon any order absolute being brought before the Master for his consideration, he shall, immediately after directing the insertion of the advertisement hereinbefore directed relative to the intended appointment of an official manager, and afterwards from time to time, determine what parties shall attend him in the proceedings to be had before him under such order absolute, or upon or with reference to any particular part of such proceedings; and it shall be lawful for the Master, at any subsequent stage of the proceedings, to direct any other parties, being contributories, to attend him in the further prosecution of the matter, or on such of the further proceedings therein as he should direct; and in particular it shall be lawful for the Master, from time to time, with the consent of the majority, both as to number and extent of interest of the premises to be represented in any particular case, such consent to be specified by some writing under the hands of the parties or their solicitors, to appoint and again remove any one or more contributories to attend and watch the proceedings of the liquidation before him, or any particular part of such proceedings, as representatives on the part of the contributories in general, or of such contributories or classes of contributories as the Master shall from time to time be of opinion ought to be so represented; and all parties, who shall be the proper parties to attend the Master as aforesaid, shall, in manner hereinafter mentioned, be served with notice of all proceedings before the Master, or with notice of such of them as such parties respectively shall be directed to attend or watch, and the costs and charges to be thereby properly incurred by all such parties respectively, except so far as the Master shall otherwise direct, shall be deemed to be part of the general costs of winding up the company under this act."

Sect. 38. "All persons whose names stand in the list of contributories shall be entitled to require, and at their own expense to receive, notice, as the Master shall

In re The Imperial Salt and Alkali Company.

Malins and Webb, for the appellant, the official manager. Section 38 of the act is to be construed in connection with section 37, which directs the Master to exercise a discretion as to the admission or exclusion of parties from attending these meetings. It would be most pernicious to the interests of the contributories if an intending purchaser was to gain a knowledge of the amount of the reserved bidding. Section 118 gives to this court the same jurisdiction and discretion as it would have had in a suit duly instituted; and that brings the case within the 51st general order of the 3d April, 1828, by which the Master is to state what parties are to attend future proceedings.¹

KNIGHT BRUCE, L. J. I think there is something nearer than that order. I think I have known instances where parties have been prevented from attending proceedings in the Master's office. I can conceive cases in which it would be extremely desirable.

LORD CRANWORTH, L. J. Might not some course like that in *Jervoise v. Clarke*, 1 J. & W. 389, be adopted? Might not the official manager, with leave of the Master, send in a sealed paper to the person conducting the sale, stating the amount of the reserved bidding?

Malins. The parties attending and seeing the materials produced before the Master to enable him to form his judgment, and observing the effect produced on him, could form a pretty good notion of what the reserved bidding would be. But if otherwise, of what use is the attendance of these parties? It is contrary to the general practice, contrary to the practice in bankruptcy, and on sales before a Master in a cause.

direct, of all or any of the proceedings in the matter of the dissolved company, and also shall be entitled, at their own expense, either personally or by solicitor or agent, to attend the proceedings; and it shall be lawful for any such contributory, at his own expense, to submit any proposal before the Master, in writing or otherwise, as the master may direct, in relation to the affairs of such company, and the winding up of the same."

Sect. 40. Parties are to name solicitors on whom notices are to be served, and then "notice of all proceedings before the Master, or before the court, to notice of which the party respectively is entitled, shall be sufficiently given by service thereof upon the party, or upon his solicitor, as the case may be."

Sect. 118. "In all proceedings under this act, the court, in addition to all powers and authorities specially given and provided by this act, shall have and exercise the like jurisdiction, powers, authorities, and discretion, so far as the same are applicable, as would have been exercisable in a suit duly instituted and duly constituted according to the rules and practice of the court, and to which all proper persons were parties, for the dissolution and winding up, or for the winding up of the affairs of the company in the matter of which the petition is presented; and the general practice of the Courts of Chancery in England and Ireland in suits pending in the same courts respectively, so far as the same shall be applicable, and so far as the same is not and shall not be inconsistent with this act, or with any rules or orders to be made under this act, shall apply to all proceedings under or by virtue of this act."

¹ GENERAL ORDER LL 3d April, 1828. "That at the time so appointed the Master shall proceed to regulate, as far as may be, the manner of the execution of such decree; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements," &c.

In re The Imperial Salt and Alkali Company.

Webb (with *Malins*) referred to the concluding words of section 40 of the act, which directed notice to be given to the solicitors of parties of those proceedings only to notice of which such parties are entitled.

Roxburgh, for Mrs. Slattery, the respondent. We do not want to see the reserved bidding: we only want to be present to see that the Master has proper trustworthy materials before him from which to estimate the reserved bidding properly. This act was passed because it was found that the mode of proceeding by suit was inapplicable to such concerns. But suppose the present proceedings were, in a suit, properly instituted, and to which Mrs. Slattery was a party, the Master could not, under the 51st general order of April, 1828, prevent her attending in his office to watch the proceedings. That order was only to prevent undue costs being thrown on the estate which was being wound up.

KNIGHT BRUCE, L. J. Do you mean to argue that if, in an ordinary suit, it were proved that one party had an interest and an intention that the estate should sell ill, and not well, this court would have no power to protect the interests of its suitors, the other parties?

Roxburgh abandoned the proposition as to ordinary suits, but maintained it as to proceedings under this act. Section 38 is not to be restricted by section 37, but is entirely excepted from its operation. The two sections do not point to the same persons. Section 37 is intended of such persons as actually seek to be paid out of the estate for their attendances; over these the Master has power. But we seek, under section 38, to attend at our own cost: and this class the Master has no power to exclude. We have already, with the Master's approbation, intimated our intention to attend all the proceedings at our own expense; and, having done this, we are entitled to attend, either personally or by solicitor.

KNIGHT BRUCE, L. J. The true application would appear to be, that the contributory may appear by a different solicitor from the intending purchaser. It is difficult here not to see beyond the person of Mrs. Slattery. I have no doubt, in a suit where there are many defendants, that the court has power to exclude one, where reason and justice render his presence improper. I should have no hesitation in making such an order in a case where the circumstances arise. Whether the circumstances arise here is another question.

Roxburgh. The authority and discretion which the court would have in a suit is not, under the 118th section, paramount to any of the powers and authorities under this act; on the contrary, that section expressly gives those additional powers and discretion so far only as they shall not be inconsistent with this act. [He then referred to 2 Dan. Ch. Prac. 1116.] So, as to the words at the end of section 34, they mean, with notice to those who are entitled to have notice, and without notice to those not entitled; they do not say who shall or

Turner v. Turner.

shall not attend. Suppose a case where an official manager wished to oblige a friend: how easily might he, by placing insufficient materials before the Master, get the reserved bidding much too low! It is, therefore, highly necessary that every contributory should attend — not putting the estate to any additional expense; and the Vice-Chancellor was right in the order appealed from.

Malins, in reply.

Knight Bruce, L. J. It is difficult or impossible to say, these contributories are not to have power to appear before the Master. The case is, that these contributories act by a solicitor, who also represents a client with a conflicting interest, and perhaps a greater amount of interest opposed to the general interest of the creditors and contributories, whom the Master and the official manager are bound to protect. I confess, if I were at liberty to act upon the impression which the materials before me have made on my mind, I should be disposed to agree with what the Master has done. I believe that he has done real and substantial justice between the parties, but the materials before me are not, in my opinion, sufficient — technically and in form sufficient — to support what has been done; and I, therefore, do not see my way to differ from the Vice-Chancellor.

Lord Cranworth, L. J., in agreeing with Knight Bruce, L. J., said he was not quite so confident that there was something behind the scenes. There was an old adage, that hard cases made bad law; but here there seemed to be, under the statute, a legal right; he would not say that the court had no power of controlling that right, but he did not know that the circumstances appearing here, on the materials before them, rendered proper or requisite the exercise of such a power.

Appeal dismissed; costs out of estate.

TURNER v. TURNER.¹

December 10, 1851.

Motions — Practice.

A motion not made when called on is to be treated as an abandoned motion.

ON this motion, which was the last in the paper, being called on,

Rolt said he appeared to oppose it; and he believed counsel were instructed to move, though they were not then present.

Knight Bruce, L. J. Well, Mr. *Rolt*, what will you do? Will you have it treated as an abandoned motion?

¹ 15 Jur. 1165. *Ex relatione* Mr. Begbie.

Gooch v. Gooch.

Rolt was unwilling to do so.

Notice was sent to the counsel understood to be engaged for the motion. In the mean time,

KNIGHT BRUCE, L. J., said, addressing the bar, that the practice as to motions was different from that as to causes. The latter, if struck out owing to the absence of the plaintiff, might usually be set down again for hearing; but with motions that was not so. Formerly there was no practice of setting motions down in a paper at all; that practice was entirely modern. Motions were formerly made, in the terms of the notice, at the time there mentioned, and if not then made, were for ever lost. And so it is now, (continued his Lordship,) notwithstanding motions may now be set down in a list, in the same manner as causes. If they are once struck out of that list, they can never be restored. And so I now decide, unless Lord Cranworth differ.

LORD CRANWORTH, L. J., however, took the same view of the practice; and after the lapse of a few minutes, no person appearing for the motion, their Lordships rose, directing the registrar, as they left the court, to treat the motion as an abandoned motion.

[The motion was afterwards, on special application, restored, only one counsel having been instructed, who was absent from illness.]

GOOCH v. GOOCH.¹

May 31, and December 2, 1851.

Construction of Will—Remoteness.

A testator gave his real estates to trustees, in trust to apply the rents for the benefit of his daughter M. and her children, born and to be born, until her youngest child should attain twenty-one, and on that event to pay her an annuity, and to pay the rents to all the children of his daughter, with benefit of survivorship if no issue, and the issue of any who should die leaving issue, until the death of the longest liver of such children; and on that event he gave his estate at S. to such son of any one of his grandchildren as should then be the eldest living grandson of his daughter; and he directed the residue of his real estate to be then sold, and gave the proceeds unto all his grandchildren, the children of his daughter, except such eldest grandson of his daughter who would be entitled to the S. estate. The testator's daughter had six children living at his death, and had none born afterwards:—

Held, that all the above gifts for the great-grandchildren of the testator were void for remoteness, and that by his grandchildren and children of his daughter, in the gift of the proceeds of the residue of his estate, he meant great-grandchildren.

WILLIAM TIPPELL, by his will, dated the 24th October, 1792, gave and devised all his real estate to William Bazire and Jonathan Tippet the younger, upon trust to receive the rents and profits during the

Gooch v. Gooch.

lives and life of the survivor or longer liver of all the children which his daughter Mary, the wife of John Gooch, had or should have, and pay and apply the same in keeping the houses and buildings in repair, and paying certain annuities and the expenses of the trust; and, subject thereto, to apply the same in the support of his said daughter, and in the maintenance, education, and bringing up of all her children which she should from time to time have living, in equal shares between her and them; and he directed, that when any of her children should attain the age of twenty-one, during the minority of her youngest living child, the part or share of such child or children attaining twenty-one should from thence be paid to him or her respectively, to and for his, her, and their own use and disposal; and when the youngest of his grandchildren, who should live to attain twenty-one, should have arrived at that age, then he directed that such savings or overplus of the said rents and profits as should be then in the hands of his trustees, and the rents then due, should be paid and divided to and amongst his said grandchildren that should be then living, equally. And his will was, that in case any of his grandchildren by his said daughter should die under twenty-one without leaving any issue then living, then that the parts and shares, or part and share, of the said rents and profits of such grandchild and children so dying under age, and without issue, should be paid and applied to and amongst his said daughter and the survivors or others of his grandchildren by her, in equal shares, to be paid to the latter at their respective ages of twenty-one years.

But in case any of his said grandchildren should depart this life under the age of twenty-one years, leaving issue of his, her, or their body or bodies, his will was, that such issue should be entitled to the share of the said rents and profits its father or mother would have been entitled to if living: and in case his said daughter should depart this life before all his grandchildren should have attained twenty-one, then his will was, that her share of the said rents and profits should from her decease be paid and applied for the use and benefit of all her children and their issue, until the youngest of such children should attain twenty-one, in equal shares: and in case his daughter should happen to be living at the time the youngest of his grandchildren by her should attain twenty-one, then upon trust to pay her an annuity of 100*l.* for her life, which he charged on his real estate as therein mentioned; and also an annuity to his brother Thomas and his sister Elizabeth Seawater respectively, to be also charged on his real estate: and from and after all his grandchildren by his said daughter, and the youngest of them, should have attained twenty-one, he directed that the clear rents and profits of his real estates accruing from that time should be applied to and amongst his said grandchildren, and the issue of any of them that should happen to die leaving issue, equally, share and share alike, and to the survivors and survivor of them, until the decease of the longest liver of his said grandchildren, the issue of any children or child so dying to be entitled only to the share which its parent, if living, would have been entitled to: and from and immediately after the decease of the survivor or longest liver of his said

grandchildren, then upon trust to convey, surrender, settle, and assure all his said messuage, &c., situate in Sutton, in the county of Suffolk, subject to the payment, with the rest of his real estate, of a proportionate part of the said annuities previously given by him unto that son of any one of his said grandchildren as should, at such decease of the survivor or longer liver of them, be then the eldest living grandson of his said daughter, and his heirs for ever, whom he directed to take the name of Tippell: and all the residue of his real estate, subject to and charged with the payment of the residue of the said annuities, he directed that it should be sold by his trustees after the decease of the longest liver or survivor of his said grandchildren, and that the moneys arising from such sale, and from the rents and profits thereof, from the decease of such surviving grandchild until such sale, he gave unto all and every his grandchildren, the children of his daughter, whether male or female, other than and except such eldest grandson of his said daughter who would be entitled to his Sutton estate by virtue of the devise thereinbefore mentioned.

And the testator gave the residue of his personal estate to his trustees, upon trust to hold the same until his youngest grandchild should attain twenty-one, for the purpose of adding the interest and dividends to the rents of his real estate, and paid and applied therewith to and for the benefit of his said daughter and her children, and their respective issue, in equal shares and proportions, and at such times and in like manner as the clear rents and profits of his real estates were directed to be paid and applied during the minority of his youngest grandchild: and upon such youngest grandchild attaining twenty-one, he gave the principal unto and amongst his said daughter, in case she should be then living, and her children; and if she should be then dead, then unto her said children, and the issue of any of them that should be then dead leaving issue, in equal shares, with a direction that such issue should take per stirpes: and the testator appointed William Bazire and Jonathan Tippell executors of his will.

The testator died in 1797, leaving his daughter Mary his only child and next of kin, and heiress at law and customary heir. She had six children, all living at the testator's death, viz., Mary Bazire, John Tippell Gooch, Anne Gooch, Maria Gooch, George Gooch, and the plaintiff, James Gooch, all then infants, except Mary Bazire, who was a child by a former husband. Mary Bazire died unmarried in 1800; Mary Gooch died in 1801; Anne Gooch died unmarried in 1807; and John Tippell Gooch died in 1837, intestate as to real estate, and leaving the defendant, Watson Gooch, his eldest son and heir at law, who was also the heir at law of the testator and of Mary Gooch, and was under the will presumptively entitled to the Sutton estate, as the eldest grandson of the testator's daughter, Mary Gooch. Maria Gooch married Robert Cann, and had issue; George Gooch was also married, and had issue. The testator's real estate consisted partly of freeholds and partly of copyholds of the tenure of borough English. The plaintiff, as the youngest son of the testator's daughter, Mary Gooch, was her customary heir, and also the customary heir of the

Gooch v. Gooch.

testator. The principal questions now discussed were, first, whether the devise of the rents and profits of the real estates to the issue of the testator's grandchildren was too remote; secondly, whether the devise of the Sutton estate to the eldest grandson of his daughter was void for remoteness; and thirdly, whether the ultimate gift of the proceeds of the residue of the testator's real estates was void for remoteness, which also involved the question whether, by the words of description used by the testator in this gift, he meant his great-grandchildren or grandchildren.

R. Palmer and *Craig*, for the plaintiff, contended that all the gifts in question were too remote. *Hughes v. Hughes*, 3 Bro. C. C. 352, 435; *Whitbread v. St. John*, 10 Ves. 152; *Singleton v. Gilbert*, 1 Cox, 68.

Walpole and *Dickinson*, for the defendant, *Watson Gooch*, contended that the construction of the will must be, to confine the devise to children of *Mary Gooch* alive at the death of the testator; any other construction would be inconsistent with the direction, that, on the youngest child attaining twenty-one, *Mary Gooch* was to cease to participate in the rents, and was to have a fixed annuity. They also referred to the doctrine of *cy près*. They cited *Bateman v. Roach*, 9 Mod. 104; *Sprackling v. Ranier*, 1 Dick. 344; *Butler v. Lowe*, 10 Sim. 317; *Storrs v. Benbow*, 2 Moo. & R. 46; *Leake v. Robinson*, 2 Mer. 363; *Jee v. Audley*, 1 Cox, 324; *Mogg v. Mogg*, 1 Mer. 654; *Harvey v. Harvey*, 4 Beav. 215; and *Vanderplank v. King*, 3 Hare, 1.

Roupell, *J. Bailey*, and *Miller*, appeared for other parties.

December 2. Sir JOHN ROMILLY, M. R., was of opinion, that the testator meant great-grandchildren, in the gift of the proceeds of the residue of his real estates; and that, according to the true construction of the will, the trust of the rents and profits of the testator's real estate for the benefit of the issue of his grandchildren, as well as the devise of the Sutton estate to the eldest grandson of his daughter, and the ultimate gift of the proceeds of the residue of his real estate, were all void for remoteness.

GOOCH v. GOOCH.¹

July 30, 1851.

Equitable Mortgage — Deposit of Title-Deeds — Lien upon Estate — Gift.

Previously to a marriage then in contemplation, the intended husband, by his agent, paid off two equitable mortgage debts of the intended wife, secured by a deposit of title-deeds belonging to her. He did this apparently to save the expense of a legal mortgage, which would otherwise have been required by the mortgagees. The title-deeds still remained

Gooch v. Gooch.

in the custody of the mortgagees. The marriage was solemnized; there was no settlement, or agreement for a settlement. There was no issue of the marriage; the husband predeceased the wife, intestate. His widow took out administration to him:—

Held, that the husband did not intend to make a gift to the wife of the money which he had paid for her, and that the debt still existed on the security of the equitable mortgage in favor of the personal estate of the deceased husband.

This was a special case, stating in effect the following facts:— In and before January, 1850, Sarah Gooch, then Sarah Stiell, widow, was seized in fee-simple of a freehold estate at Henley-upon-Thames. Before the said month of January, 1850, the said Sarah Stiell, being so seized as aforesaid, deposited the title-deeds of the said estate with Messrs. Sewell & Fox, solicitors, by way of equitable mortgage to secure the repayment of a sum of 400*l.* advanced by them to her, the said Sarah Stiell, together with interest in respect of such advance; and also the further sum of 400*l.* advanced by Jeremiah Byles to the said Sarah Stiell, with interest. In January, 1850, a marriage was in contemplation between Sarah Stiell and the Rev. Edward Gooch. In the same month, after the marriage had been agreed upon, the said Jeremiah Byles requested the said Sarah Stiell to repay him the said sum of 400*l.*, which was then due to him upon the equitable mortgage from her. Sarah Stiell thereupon proposed to Messrs. Sewell & Fox that they should pay off for her this sum of 400*l.*, which they agreed to do on her executing a legal mortgage to them to secure the repayment of the said two sums of 400*l.* and 400*l.*, at the same time telling her that the transaction would be expensive to her. Sarah Stiell informed Edward Gooch of these circumstances, and he thereupon offered to pay for her the said two sums of 400*l.*, to which Sarah Stiell assented; and shortly afterwards, and previous to the solemnization of the then intended marriage, Edward Gooch, by his agent, paid 400*l.* to Messrs. Barnett & Co., bankers, London, to the credit of Jeremiah Byles, with his bankers, Messrs. Alexander, Ipswich. Jeremiah Byles thereupon wrote to Messrs. Sewell & Fox, acknowledging that his charge was satisfied, that he had no further lien on the title-deeds, and that Sarah Stiell wished to have them again; and at the same time Edward Gooch, by his agent, paid the sum of 400*l.* to Messrs. Sewell & Fox, in discharge of the sum then due to them upon such equitable mortgage as aforesaid; but Messrs. Sewell & Fox had not at that time, nor at any subsequent time during the life of the said Edward Gooch, any communication with him on the subject, and the said title-deeds were suffered to remain with the said Messrs. Sewell & Fox, and still remained in the hands of Messrs. Sewell, Fox, & Sewell, their present firm. The marriage between Edward Gooch and Sarah Stiell was solemnized in February, 1850, but no settlement, or articles, or agreement for a settlement, was ever made, either before or subsequent to the marriage. There was not any issue of the marriage. In the month of May, 1850, Edward Gooch died intestate, leaving Sarah Gooch, his widow, and his brother and sister, Arthur Gooch and Emily Gooch, his only next of kin according to the Statutes of Distributions. On the 19th October, 1850, letters of administration to the personal estate and effects of the

Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.

said Edward Gooch were granted to the said Sarah Gooch, his widow, by the Prerogative Court of Canterbury. The question submitted by this case was, whether Sarah Gooch was entitled to the said freehold estate freed and discharged from the said debt of 800*l.*, and every part thereof, or whether the said freehold estate was still liable to any and what lien or equitable mortgage in favor of the personal estate of the said Edward Gooch for the said sum of 800*l.*, or any and what part thereof.

Glasse and Selwyn, for the plaintiff, referred to *Pitt v. Pitt*, Turn. & R. 180, and *Penfold v. Bouch*, 4 Hare, 271.

J. Bailey and Wailey, for Emily Gooch, referred to *Bagot v. Oughton*, 1 P. Wms. 347.

Russell and Terrell, for the widow.

KNIGHT BRUCE, V. C., said that the first question was, what was the intention to be collected from the circumstances stated in the special case, and to which he was confined. He was of opinion that the true inference was, that the husband did not mean to make a gift of this money to the wife, but to save expense, or from some other cause, he was willing to take upon himself the security, and accordingly he paid the money. The true result, notwithstanding Mr. Byles's letter, was, that the legal debt remained to him and Messrs. Sewell & Fox, but that they held the debt so legally due to them in trust for the husband. Whether the debt then remained—that is, whether, if the husband had left an executor, not his wife, it could be recovered as a personal claim—it was not necessary to say. In his honor's opinion, the intention was to preserve the security on the land. The second question must therefore be answered in the affirmative; that was, that the freehold estate was still liable to the lien or equitable mortgage in favor of the personal estate of Edward Gooch for the sum of 800*l.*

BRADBURY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY and S. BOWLER.¹

November 15, 1851.

Injunction—Power to restrain Parties from doing unlawful Acts—Want of Power to undo what has been done.

The above-named railway company had become owners of a canal by purchase, and they were bound, by several statutes, to keep it open and navigable. The plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself: this fact was denied by the defendants, who built a wall across the bay, so as to make the canal of the same width there as in other parts. The plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them from doing more:—

Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.

Held, that the court could not make the defendants undo any thing done, but that the plaintiff was entitled to an injunction to restrain them from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right.

THIS was a motion for an injunction. The bill stated, in effect, that by an act passed in the 37 Geo. 3, intituled "An act for making a navigable canal from Manchester to Ashton-under-Lyne and Oldham, in the County Palatine of Lancaster," a canal company was incorporated by the name of "The Company of Proprietors of the Canal Navigation from Manchester to or near Ashton-under-Lyne and Oldham," and by that name they were to have power to purchase lands, and to make the canal and works, with, amongst other things, proper places for boats to turn, lie, and pass, as therein mentioned. And by sect. 86 of the same act it was enacted, that the owner or owners of any lands or grounds through which the said intended canal should be made might erect or use any wharves, quays, landing-places, cranes, weighing-beams, or warehouses in or upon their respective lands, grounds, or wastes adjoining or near to the said intended canal, and might land any goods or other things upon such wharves, quays, landing-places, or upon the banks lying between the same and the said intended canal; and also might make and use proper and convenient places for boats and other vessels to lie in, turn, and pass by each other, so that the making or using thereof should not obstruct or prejudice the navigation of the said intended canal, or any towing-path on the sides thereof. By certain acts passed in the 33 Geo. 3 and 38 Geo. 3, the former act was amended; and by the last-mentioned act the company were empowered to sell and dispose of, and, by indenture under their common seal, to grant and convey in fee farm, or to demise for a term of years, such part or parts of the lands or buildings purchased or to be purchased by them under their former act as they should not want, and also to sell and convey, by way of absolute sale, such lands or buildings as aforesaid. By certain other acts passed in the thirty-ninth and forty-fifth years of the reign of George the Third, additional powers of raising capital were given to the said company. By an act passed in the eleventh and twelfth years of the reign of her present Majesty, intituled "An act for vesting in the Manchester, Sheffield, and Lincolnshire Railway Company the Canal Navigation from Manchester to or near Ashton-under-Lyne and Oldham," the said canal, and all works attached thereto, and all the estates, easements, rights, powers, authorities, and privileges whatsoever belonging thereto, and the benefit of all contracts, agreements, and proceedings in any way relating thereto, were, from the passing of the now stating act, vested in the Manchester, Sheffield, and Lincolnshire Railway Company forever, or for all other the estate and interest of the said canal company therein; and the said railway company were to be subject to, and to perform and conform to, all conditions, directions, duties, liabilities, and restrictions to which the said canal company were subject or liable under any act of parliament; and by sect. 22 it was enacted, that the said railway company should from time to time, and at all times after the passing of the now stating act, keep and maintain the said

Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.

canal, and every part thereof, and all the works thereto belonging, well and sufficiently repaired, dredged, cleaned, scoured, and in good order and condition, and preserve the supplies of water to the same, so that the same canal, and every part thereof, might be at all times kept open and navigable for the use of all persons desirous to use and navigate the same. By the Manchester, Sheffield, and Lincolnshire Railway Act, 1849, the said railway company was dissolved, and a new one was incorporated by the same name, and all the property, powers, and liabilities of the former company were vested in the newly-formed company, which was to be considered identical in these respects with the dissolved company.

The portion of the canal about which there was now question consisted of a lock, and a part of the canal at the north-east end of it, which the bill stated was widened to a considerable extent beyond the average width of the canal, so as to form a place for boats to turn, lie, and pass, according to the powers in that behalf contained in the said first-mentioned act. In 1802 the company sold part of the piece of land in the angle between the canal and the wider part, and abutting upon the side of the said widened part, and the same was conveyed to the owners of the adjoining land, with all easements and advantages belonging thereto, reserving a certain rent. The said land, by divers mesne conveyances, and ultimately by certain indentures, dated the 26th and 27th October, 1821, was conveyed to G. Lowe in fee, and in this last conveyance it was described as bounded on the northerly side by the Ashton Canal. Lowe built a factory on the land so conveyed. By certain other mesne conveyances, and ultimately by indentures of lease and release, dated respectively the 1st and 2d February, 1837, the said land, buildings, and hereditaments were conveyed to the present plaintiff in fee.

In course of time a portion of the said wide part became filled up, adjoining the plaintiff's land, and the plaintiff agreed to purchase this part, so as to secure a water frontage; and by an indenture, dated the 16th May, 1840, to which the company were party, and which was executed by their common seal, the company conveyed it to the plaintiff in fee, and the deed described the land conveyed thereby as being bounded on one side by the canal. The bill then stated, that after the execution of the last-mentioned indenture, the plaintiff built another factory on the land, up to the extremity of it, and abutting upon the said widened part of the canal: that it was important to the plaintiff's business to have a water frontage: that in the Whitsun week of 1850 the defendant Mr. Bowler commenced building a wall across the widened part, so as to reduce the width of the canal there to the average width in other places; the plaintiff thereupon gave notice to Mr. Bowler to desist from building such wall. The bill then stated a correspondence between the solicitor of the plaintiff and of the company, the result of which was an agreement by the company to leave a branch canal one boat in width adjoining the plaintiff's mill: that in Whitsun week in the present year the wall was continued completely up to the plaintiff's premises, without leaving a branch, according to the agreement, and that the effect was, that no

Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.

water now flowed into the wide part, and that workmen had proceeded to fill it up, and that the defendants intended to continue the wall, without making any branch canal.

The bill prayed that the said defendants, their workmen, servants, and agents, might be restrained by injunction from excluding the water of the said canal from flowing into the wide part of the said canal at the north-east of the plaintiff's said property, as it did before Whitsuntide, 1850, or from permitting the same to continue so excluded, and from filling in the said portion of the said canal, or any part thereof; or from continuing, or permitting to remain, the said wall, or the materials already thrown into the canal; or erecting, or permitting to remain, any walls, operations, or works whereby the water might be prevented from running and flowing into the said wide part of the said canal, as it did before Whitsuntide, 1850, or whereby the water access over the said canal to the said north-east frontage of the plaintiff's said property might be obstructed or prejudicially affected; and for further relief. The notice of motion was for an injunction in the terms of the prayer, until answer or further order. The plaintiff filed an affidavit supporting the statements in the bill, and stating that circumstances would probably arise to render the part now to be filled up useful to him as a water frontage. Numerous other affidavits were filed on both sides; and there was a conflict of evidence as to the wide part having ever been part of the canal, properly so called.

Bacon and *J. V. Prior*, for the plaintiff, contended that this was a part of the canal which the company were bound, by the acts referred to, to keep open. They cited *Blakemore v. The Glamorganshire Canal Company*, 5 Tyr. 611.

Malins, for the defendants, said that the plaintiff did not allege that he had sustained any injury in fact, but only that circumstances would probably arise in which the acts complained of would become an injury. Such an allegation could not authorize the extraordinary interference of this court by an injunction to prevent so doubtful an injury.

G. L. Russell (with *Malins*) said that the injunction asked was in part to compel the company to undo what the plaintiff himself alleged was completely done. This was beyond the jurisdiction of the court. The plaintiff did not put his case higher than this, that damage might probably arise. Such a statement could not entitle him to an injunction in any case.

[SIR J. PARKER, V. C. The only question is, whether the act is wrongful; we have not got further than that.]

Your honor will leave him to try that question at law.

[SIR J. PARKER, V. C. You require the plaintiff to prove his title. Will you undertake to undo what has been done, if the action goes against you?]

Gore v. Harris.

Malins refused to give such undertaking.

Bacon, in reply.

SIR J. PARKER, V. C. I think that the plaintiff is entitled to an injunction to restrain the further prosecution of the works complained of. He has, it appears, a mill abutting on the water concerning which there is this dispute, whether it is part of the canal or not. The defendants assert a right to dam up this. If the water be part of the canal, they have no right to do so, or the right is so doubtful that the defendants ought to be restrained from filling it up until the right has been decided by proceedings at law. The plaintiff should bring an action on the case to try the right. The defendants decline to give an undertaking to restore matters to their former state. I think that the plaintiff, undertaking to bring such an action, is entitled to an injunction to restrain the defendants from doing more than is already done. I cannot make them undo any thing actually done.

After some conversation, it was agreed that the defendants should give an undertaking not to proceed with the works already begun, or in any way to alter the present condition of the plot in question; the plaintiff undertaking to commence, and at the next Liverpool assizes to try, such action as he might be advised, against the company, who were to admit that they had done the act complained of; and the motion was ordered to stand over.

GORE v. HARRIS.¹

November 8 and 14, 1851.

Evidence — Demurrer by Witness to Interrogatory, on the Ground of Privilege.

The rule of privilege protecting confidential communications does not extend to communications between the solicitors of opposite parties.

A bill was filed to set aside a deed, on the ground of alterations having been improperly made in it after execution. A defendant examined the solicitor of a plaintiff as a witness to prove communications between them, showing that the solicitor was aware of the alteration in the deed. To the interrogatory on this point the witness demurred, because he alleged that it inquired about matters only known to him as solicitor for the plaintiff:—

Held, that this could not protect him from the necessity of disclosing his communications with the defendant.

This was a demurrer to an interrogatory on the part of Sanders, a defendant, by the witness, on the ground of privilege. The interrogatory was in these words:—“Look upon the paper writing produced and shown to you at this the time of your examination, marked with

¹ 15 Jur. 1168; 21 Law J. Rep. (N. S.) Chanc. 10.

Gore v. Harris.

the letter Z, and purporting to be a draft assignment from the above-named defendant W. Sanders to the Rev. Charles Gore, therein described, and the above-named John Bowser and others. Did or did not the said W. Sanders, at any time, and when, call upon you as to making out a statement of accounts between himself and the said Rev. Charles Gore, in the pleadings of these causes named; did or did not the said W. Sanders, on that or on what other occasion, leave the said produced paper writing with you, or with the firm of Messrs. Goode, in the pleadings of these causes named; did you at any time afterwards, and at what time first, inform the said W. Sanders that the said paper writing was not a perfect copy of the indenture, dated the 20th day of April, 1841, in the pleadings in these causes mentioned; whether or not did you then produce a copy of the said last-mentioned indenture, and did you or did you not then, or when else, copy from the said copy of indenture, or insert in the produced paper writing marked Z, any words? Look upon the words, 'the costs hereinbefore mentioned to be due to the said John Harris,' now appearing to be inserted, among others, at or opposite p. 8 of the said produced paper writing, and state of whose handwriting are the said words, and when or about what time were the said words inserted in the said produced paper writing; did you or did you not upon that occasion deliver or return the said produced paper writing marked Z, to the said defendant W. Sanders, with the said words inserted therein?" The witness demurred to answer, and for cause of demurrer said, that the interrogatory inquired respecting matters about which he had only obtained information by means of confidential communications made to him by or in the course of his agency for his client, the Rev. Charles Gore, during the period that he was so acting for him in this cause in his capacity as a solicitor.

It appeared that the original bill was filed to obtain an account of certain property which had been assigned by the defendant Sanders to the Rev. Charles Gore, of whom the present plaintiffs were the executors, for the benefit of creditors, and to have the judgment of the court on the construction of the deed of assignment, being the deed mentioned in the interrogatory. After publication had passed in the original suit, it was discovered that the executed deed contained a clause not contained in the copy which had been furnished by the defendant Sanders to the plaintiffs in that suit, and according to which copy the plaintiffs had framed their original bill. A supplemental bill was thereupon filed to make Harris, who claimed, under the omitted clause in the deed, nearly the whole of the trust funds for costs, a defendant in the suit, and to compel him to account for the moneys received by him; and the supplemental bill also sought to rescind the deed, on the ground that the insertion of the clause in question had not been authorized by the Rev. Charles Gore, who had died on the day of the date of the deed of assignment. The defence was, that the plaintiffs knew of the interlineation before publication passed in the original suit, and proof of this was sought to be obtained by discovery of what occurred at an interview between the defendant Sanders, and Goode, the solicitor of the plaintiffs; the defendants trying by the

Gore v. Harris.

above interrogatory to prove that Goode on that occasion pointed out that a copy of the deed belonging to Sanders was imperfect, and perfected it by adding in pencil the clause in question.

Swanston and *Moxon*, for the demurrer, contended, that if Goode ever inserted the clause, he must have done so in his character of confidential solicitor, and it was therefore protected by the rule laid down in *Greenough v. Gaskell*, 1 My. & K. 102, where Lord Brougham, C., speaking of counsel or solicitors, said, "If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit, in the transaction of his business; or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness." If Goode ever did insert this clause, he must have done so in his character of confidential solicitor to the plaintiffs.

Wigram and *Shapter*, contra. This is our document, with their pencil interpolation. The rule is confied to communications between a solicitor and his own client; it does not extend to communications between solicitors of adverse parties, or between one party and the solicitor of his opponent. [They quoted from the judgment in *Desborough v. Rawlins*, 3 My. & C. 520, where, the communication sought to be protected having passed between the agents of two companies, adverse parties, Lord Cottenham, C., said, this "was a communication from an adverse party," and "was not within the mischief which" the rule as to privileged communications "is intended to guard against, and therefore not within the rule." They also cited *Spencley v. Schulenburg*, 7 East, 357, and *Parkhurst v. Lowten*, 2 Swanst. 194, and in particular Lord Eldon's words in p. 216.]

Swanston, in reply.

Sir J. PARKER, V. C. In this case the defendant Sanders proposed to examine Goode as a witness. Goode is a solicitor, and he was concerned in that character for the plaintiffs' testator. Goode demurs to answer the interrogatory, on the ground that it relates to matters about which he had only obtained information by means of his agency for his client during the time that he was acting for him in his capacity as a solicitor. One of the objects of the suit is to set aside a certain deed on the ground of fraud, alleging that a material clause contained in that deed was not communicated to the plaintiffs until a recent period. The defendant Sanders alleges that the clause was known to the plaintiffs much earlier, and that at an interview the latter produced to Sanders a copy of the deed. By the interrogatory, to which Goode demurs, Sanders proposes to examine him as to what

Re The Pennant and Craigwen Consolidated Lead Mining Company.

took place at that interview. I cannot doubt that Goode is bound to answer this interrogatory. In the transaction in question in the case, a plaintiff employs his solicitor, and as his agent, to communicate with the opposite party. I do not see how that communication can be regarded as either privileged or confidential, and I think that the solicitor must be examined to state what the communication really was. Everybody knows that it is the every-day practice that communications of this nature pass between the solicitors of the opposite parties, and that orders are often made for production of letters that pass between the solicitors and parties on the opposite side.

Demurrer overruled.¹

*Re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849;
Re THE PENNANT AND CRAIGWEN CONSOLIDATED LEAD MINING
COMPANY.²*

December 10, 11, and 15, 1851.

Petition for Winding-up Order — Company within the Acts.

Two mining companies agreed to amalgamate upon certain terms, one of which was, that one company should pay to the other 1600*l.*, and should also provide working materials of the value of 1600*l.* for the mines of the other. This agreement was afterwards modified by a new agreement, which provided for the security by promissory notes of the debts due from one company to the other. These promissory notes were not given, and there was a conflict of evidence as to whether the debt from one company to the other was ever in fact paid; but the amalgamated company carried on business, and made calls, which were partly paid. No profits were obtained from the mines, and at a meeting in September last it was proposed that the company should be wound up. This was approved by the majority of shareholders present, but negatived on the votes being taken, because one of the dissentients voted in respect of about 1700 shares. The company then ceased to carry on business, and actions were brought against some of the directors in respect of the company's debts. Of these actions due notice was given to the company, but they did not provide for them in any way. The landlord of one of the mines had also proceeded to recover the rent. On a petition for a winding-up order being presented:—

Held, that these circumstances brought the case within the Winding-up Acts; and the order was made accordingly.

A PETITION was presented in this case for an order to dissolve and wind up the Pennant and Craigwen Consolidated Lead Mining Company, under the above-mentioned statutes. In 1848 two mining companies, called respectively "The Pennant Company" and "The Craigwen Company," entered into an agreement for an amalgamation, and the terms of that agreement were, that the Pennant shareholders should take 1600 shares of 2*l.* each in the Craigwen Company, to make that company's shares 4000 in number of 2*l.* each, or 8000*l.*, for which capital the Craigwen Company agreed to amalgamate.

¹ The case will be found reported on another point, 20 Law J. Rep. (N. S.) Chanc. 74; s. c. 1 Eng. Rep. 184.

² 15 Jur. 1192.

Re The Pennant and Craigwen Consolidated Lead Mining Company.

The two companies were to participate mutually in their respective profits, and to possess an interest in one another's works, machinery, and property, in proportion to the shares held by them, as an amalgamated company of 8000 shares; and the Pennant Company agreed to pay to the Craigwen Company the sum of 1600*l.*, 600*l.* thereof forthwith, and 1000*l.* more at a month's notice, for which the Craigwen shareholders undertook to complete the lease of the Craigwen mine then agreed for, and to provide working machinery for the same; and the Pennant Company further agreed to provide working capital for the amalgamated company as might be required, without calling upon the Craigwen shareholders, until a further sum of 1600*l.* was paid; such two sums of 1600*l.* to be represented by 1600 shares of 2*l.* each in the Craigwen Company. Both the said companies were to pay their respective debts and liabilities up to that day, and the amalgamated company was to be conducted on the cost-book principle. The sum of 600*l.* was afterwards paid by the Pennant Company to the Craigwen Company, but the sum of 1000*l.* agreed to be paid by them was not paid, notwithstanding several notices had been given to the directors of the Pennant Company requiring payment thereof. The Pennant Company, moreover, neglected to provide working capital for the amalgamated company. By articles of agreement, dated in 1849, the previous agreement was modified, by provisions that the said sum of 1000*l.* so agreed to be paid should be forthwith secured by the promissory note of the directors of the Pennant Company, as therein mentioned, and that the Pennant Company should also give a promissory note for 500*l.* to John Bird, the ground landlord of the Craigwen mine, and a promissory note for a similar sum on account of the machinery of the Craigwen mine, instead of providing working capital of the value of 1600*l.*, as stipulated in the former articles of agreement; and the Craigwen Company were to contribute, *pari passu*, to all calls on account of the amalgamated company. The Pennant Company did not give such promissory notes as were mentioned in the last stated agreement. The amalgamated company afterwards made six calls upon the shareholders thereof, and received about 4860*l.* in respect of such calls, and out of that money the above-mentioned liabilities of the Pennant Company, under the agreement, were partly discharged. Many of the calls were not paid up, and some were paid by the shareholders who opposed this petition, by bills and promissory notes, which were dishonored. There was a conflict of evidence as to whether the sum agreed to be paid by the Pennant to the Craigwen Company was ever in fact paid. The project not being successful, and no profits having been received from the mines, it was proposed, at a meeting held on the 26th September, 1851, that the company should be wound up, but a majority of shareholders voted against such proposal on that occasion. The petitioners stated that the majority of persons present were in favor of the winding up of the company, but the majority of votes was against it, occasioned by the circumstance that Mr. John Bush, the auditor of the company, held proxies, which together with his own votes, represented about 1700 shares. This

Re The Pennant and Craigwen Consolidated Lead Mining Company.

Mr. Bush, and his brother, Mr. Alfred Bush, who was a director of the company, were the principal opponents to the present petition. They represented that the company was solvent, which the petitioners denied. The company had ceased to carry on business since September, 1851, and the lessor had taken proceedings to recover an arrear of rent. Several actions, moreover, had been brought against the petitioners for the company's debts, in one of which a judge's order had been obtained. Notice of these actions had been given to the company by the petitioners more than ten days before presenting this petition, but no step had been taken by the company in consequence, either to pay, secure, or compound the debts, or to indemnify the petitioners. There were no assets of the company to meet the demands upon them.

Daniel and *Roxburgh*, for the petition, submitted that this was a case within the acts, and that the winding-up order ought to be made.

W. Morris and *H. Stevens*, for different shareholders, also supported the petition.

Malins and *J. V. Prior*, for the respondents, objected that there was, in fact, no consolidated company to wind up, for the conditions of the agreement for the consolidation had not been fulfilled, the Pennant Company not having paid to the Craigwen Company the sum, payment of which was a condition precedent of the amalgamation. Then the court would not make the act of parliament a screen for shareholders who had misconducted themselves. Here the Pennant Company were indebted to a large amount to the Craigwen Company by the terms of the agreement. Those debts were still unpaid, and this was, in fact, an attempt to escape the payment of those debts, to apply the funds of the joint company to discharge liabilities which the Pennant Company alone were bound to pay. It was said that the company had ceased to carry on business; but it was not competent to the directors to stop the concern, and then come to the court and allege that as a reason for having the company wound up. It might be that the company, having got over the preliminary expenses, were now in a position to carry on their works so as to remunerate themselves. There should, at any rate, be a previous reference to the Master, to inquire as to the expediency of making a winding-up order.

Daniel, in reply. This is clearly the consolidated company; the cost-book, as well as the affidavits, are evidence of that fact.

[Sir J. PARKER, V. C. It appears to have entered into contracts, made calls, and carried on business as the amalgamated company.]

That is so. The circumstances of this case are such as to justify an immediate order. Calls have been made to a large amount, which are still unpaid. There is no suggestion that the mines have yielded any profit. Debts are due, for which actions have been

Re The Pennant and Craigwen Consolidated Lead Mining Co.

brought against members, and the company, notwithstanding notice, has neglected to provide for them. Then, as to the debt alleged to be due from the Pennant Company, there is a dispute about that; the petitioners affirm that it has been paid.

[Sir J. PARKER, V. C. I understand that the 1500*l.* agreed to be paid by the contract of 1849 was over and above the calls. I do not see how the calls paid by both classes of shareholders can be applied to satisfy the liabilities of the directors of the Pennant Company, under the agreement of 1849.]

We say that these liabilities have been properly discharged, and that, in truth, the Craigwen Company is now indebted to the Pennant Company.

December 15. Sir J. PARKER, V. C., said, The petition in this matter was presented by three gentlemen, who describe themselves as directors of the Pennant and Craigwen Consolidated Lead Mining Company, and it prays the dissolution and winding up of that company under the acts of 1848 and 1849. It is not disputed that the company has ceased to carry on business, except for the purpose of winding up its affairs. It appears that actions have been commenced against the three petitioners and other persons, as defendants, and that notices of these actions have been given to the company by the petitioners, in conformity with the provisions of the Winding-up Acts, and that the company have not provided for the amount of the claims in those actions, and therefore it is clear that this is, *prima facie*, a case within the provisions of the acts. The circumstances appear to be these: Before the year 1848 there were two companies existing, viz. the Pennant Company and the Craigwen Company. The present company was formed in 1848 by the consolidation of these two companies. Calls have been made since the consolidation to a large amount, and many still remain unpaid. A considerable amount of debt is due from the company; one side say 1500*l.*, the other 2300*l.* All the money received appears to have been expended. There is, in addition, a very considerable outlay by the two companies before the consolidation. It appears that no dividends have been made; and not only it is not alleged that there has been any profit from working the mines, but it seems that scarcely any thing has been received from the mines at all. The working seems to have continued down to August last, but it has not been alleged that the mines were valuable, or capable of being profitably worked. It appears that the landlord has instituted proceedings for the rent due. There are also actions against the petitioners and certain of the shareholders. It is not alleged that there are any assets of the company to meet these demands upon them. In addition to this, there appear to be dissensions among the members of the company. It is also said that there are shareholders to a considerable amount who have not paid the claims upon them; there is, therefore, no doubt that this is a probable case for an order to wind up the company. What are the objections to this? There are two parties who oppose it, Mr. Alfred Bush, a director of the company, and Mr. John Bush,

Re The Pennant and Craigwen Consolidated Lead Mining Co.

who are both possessed of a large number of shares, the origin of their interest being, that they were interested in the Craigwen Company before the amalgamation.

Two points were made by them; first, that there is no consolidated company, the consolidation depending upon the fulfilment by the Pennant Company of certain conditions contained, or expressed to be contained, in the terms of the agreement of consolidation. Looking at this agreement, I do not find that to be the case at all; the state of the case seems to be, that the consolidated company has carried on business, and has acted entirely as a consolidated company,—debts having been incurred, calls having been made, money having been expended, and actions brought against the shareholders in consequence of the liabilities and engagements of the consolidated company. All that appears upon the subject in the agreement for consolidation is, that, as a security for the performance of it, the Messrs. Bush were to retain certain instruments belonging to the mines of the Craigwen Company, until the conditions were fulfilled. That does not interfere with the entire formation of the consolidated company; and any equities to which the Messrs. Bush or the Craigwen Company may be entitled, it would, of course, be open to them to assert on the final adjusting of the affairs of this company. The second point made was, that, the petitioners being directors of the company, there had been a misapplication of the funds of the company by the petitioners themselves, and that the present state of things was occasioned by the default of the petitioners; and, therefore, at this instance, an order for winding up could not be made. I have read the affidavits, and I find that on this point there is great perplexity and confusion; but I do not find in them a clear charge against the petitioners of such default as to disentitle them to come here to petition for a winding-up order. There may have been misapplication of the funds, possibly there has been; there is no charge that it was caused by the petitioners in such manner as to disentitle them to come in person, for an order to wind up the company. I therefore do not see any reason to entitle the Messrs. Bush to raise these objections. Then it was said there must be merely a preliminary reference to the Master. I do not see that there would be any advantage in such reference. The only reference that could be made would be, that the Master should consider the necessity and expediency of winding up the company's affairs. The first objection was merely to entertaining a petition by these parties at all. And then it is said, if the petition be entertained at all, there is enough to show that it is not a case in which it is both necessary and expedient to make the order. I think that here it is for the benefit of the general body of the shareholders in the company that the case should be dealt with under these acts. I therefore shall make the order as prayed

 Buxton v. James.

BUXTON v. JAMES.¹

December 1, 1851.

Copyright—Injunction

In 1844 the plaintiff purchased the English copyright of some musical compositions by Mendelsohn. In August of that year the plaintiff published this music in England, and it was published simultaneously in Berlin. In 1849, there being then conflicting decisions on the question of foreign copyright in England, the defendant published the said music on his own account. The plaintiff thereupon gave the defendant notice to desist from such publication, or that he would take legal proceedings against him. The defendant paid no regard to such notice. The plaintiff delayed to proceed against him. In May, 1851, the Appeal Court of the Exchequer Chamber decided in favor of the foreign copyright. The plaintiff thereupon gave another notice to the defendant to desist, and, upon his disregarding it, filed this bill for an injunction. On motion the injunction was granted, and the plaintiff was put on terms to bring an action to try his right, if the defendant required him.

THIS was a special motion for an injunction to restrain the defendant from selling that portion of No. 111 of the "Pianista" which contained three piano forte solos from Mendelsohn's original composition of music to Shakspeare's "Midsummer Night's Dream," called respectively the "Scherzo," the "Notturmo," and the "Wedding March;" and also from printing any further copies of the said No. 111 of the "Pianista," which should contain the said pieces, or any of them; and also from printing, publishing, or selling any portion of the said work or composition of music to Shakspeare's "Midsummer Night's Dream," composed and arranged by Mendelsohn, except the overture thereof. It appeared that in February, 1844, the plaintiff purchased from Mendelsohn the copyright of the three pieces of music in question for the sum of 47*l.* 5*s.*, and he published them in this country for the first time in August in that year. They were also simultaneously published in Berlin. On the 1st November, 1849, the defendant published and sold on his own account the same pieces of music, together with the overture to the "Midsummer Night's Dream," the copyright of which last piece of music was not the plaintiff's property. On the 6th of that month the plaintiff first became aware of such sale by the defendant, and he on that day gave the defendant notice of his being the owner of the three former pieces of music, and that, unless the sale were discontinued, and the plates broken up, he should take legal proceedings against him. The defendant paid no regard to this notice, but continued the sale. In 1850 Mendelsohn died. No further steps were taken by the plaintiff till the 20th March, 1851, when he issued a circular to the publishers of foreign music, of whom the defendant was one, insisting on his right to the music in question. On the 20th May, 1851, the Exchequer Chamber gave judgment in the case of *Boosey v. Jefferies*, 20 Law J. Rep. (N. S.) Exch. 354; s. c. 4 Eng. Rep. 479, overruling the decision of Lord Cranworth (then Rolfe, B.) in the court below. On the 20th August the plaintiff's solicitor wrote a letter to the defendant, referring to the case of *Boosey v. Jefferies*, and again threaten-

Buxton v. James.

ing legal proceedings against the defendant if the sale were not discontinued. This letter being also disregarded, the present bill was filed.

Kenyon Parker and Hislop Clarke, for the plaintiff, said, that in 1849, when the first infringement of the plaintiff's right was attempted, and he gave the first notice, the question of foreign copyright was being agitated, and the decisions of the courts of law were opposed to one another, the Court of Queen's Bench and the Court of Common Pleas having decided in favor of the foreign copyright, and the Court of Exchequer against it. *Cocks v. Purday*, 5 C. B. 860; *Boosey v. Davidson*, 13 Jur. 678; *Boosey v. Purday*, 3 Exch. 145. The plaintiff was therefore advised to delay his threatened prosecution until the law was settled. Immediately on that taking place, by the judgment in *Boosey v. Jefferies* in the Exchequer Chamber in 1851, he again gave notice to the defendant, and, that notice being disregarded, filed this bill. The case of *Cocks v. Purday* was precisely analogous to this; there was in that case a simultaneous publication in England and abroad. They referred to *Ollendorff v. Black*, 14 Jur. 1080; s. c. 1 Eng. Rep. 114.

Malins and C. Hall, for the defendant, said that the remedy of the plaintiff, if any, was at law. As the law was in 1849, a foreigner had no copyright in this country. Then the plaintiff, by so long delay in asserting his right, must be taken to have acquiesced in the infringement, if it were one. To restrain this publication now would be a very small advantage, if any, to the plaintiff, but a great injury to the defendant. *Boosey v. Jefferies* had been appealed from to the House of Lords, and the law could not be considered settled till it was decided there. They also cited *Robinson v. Rosher*, 1 Y. & C. C. C. 7; *Moore v. Choat*, 8 Sim. 508; *Baily v. Taylor*, 1 Russ. & M. 73; *King v. Reed*, 8 Ves. 224, note; *Whittingham v. Wooler*, 2 Swanst. 428; and *Spottiswoode v. Clark*, 2 Ph. 154.

Sir J. PARKER, V. C., said he thought that he must grant the injunction asked. It might be that the plaintiff had his remedy at law; but it was not now denied that if, as the law then stood, he had a legal right to the pieces of music in question, the defendant had infringed his copyright in them. But then it was said that *Boosey v. Jefferies*, although a decision by the Exchequer Chamber, was under appeal to the House of Lords, and that the court could not, therefore, treat the case as having finally established the law. But in granting the injunction, he did so on what appeared to him to be the law as laid down by the Exchequer Chamber; and he confessed he had never himself entertained any doubt as to the law, which had been considered as unsettled, on this subject. He thought, therefore, that the injunction must be granted, the plaintiff undertaking, if required by the defendant, to establish his right at law. Another objection made was the delay that had taken place in instituting the present suit. As to this, his honor thought, that as the law was understood

Innes v. Sayer.

in November, 1849, the plaintiff might very innocently and legally have imagined that he was right in not taking proceedings in this court. The court, however, had not to try the defendant's motives, but whether the defendant was aware that he was invading the plaintiff's copyright; and whether the law, as it was at present settled, established that the defendant had for a long time been doing that which he had no right to do. It certainly appeared to his honor that the law was settled. Then it was said that the plaintiff had improperly delayed instituting this suit. Supposing that he had filed his bill in November, 1849, the court would probably have refused to interfere, and have put him on the terms of bringing his action at law, or would have delayed interfering until the law was settled by the result of the decision in *Boosey v. Jefferies*. His honor did not think the plaintiff was bound to do more than he had done: he had given the defendant notice insisting upon his right, but waited until the law was determined by the judgment of the Exchequer Chamber in *Boosey v. Jefferies*. Why was time to be considered important in this case? It was because the defendant might be considered as treating the plaintiff as having abandoned his rights. There was no evidence here that he had done so. The plaintiff, on being made aware of the infringement of his copyright, gave the defendant notice, and then waited until the decision of the Exchequer Chamber. This was not enough to deprive the plaintiff of his rights. He had subsequently given another notice. His honor said that if he were compelled to refuse the injunction on the ground of delay, he should probably be refusing all equitable relief to the plaintiff. He thought the plaintiff was entitled to the injunction; but if the defendant required it, he should put him under the terms of bringing an action at law to establish his right. The case might be mentioned on the next seal-day, before which time the defendant must elect whether he would put the plaintiff to his action at law or not.

INNES v. SAYER.¹

January 22, 23, and 24, and November 25, 1851.

Powers — Will — Defective Execution aided in Favor of Charities.

J. I., having a life estate in 10,000*l.*, 3*l.* per cent consols, and other sums of stock, with a power of appointment, by deed or will, over one third part thereof; and if by will, to be by her signed and published in the presence of two or more witnesses; by her will, in 1833, which was unattested, and did not refer to the power, gave several sums of 3*l.* per cent. consols to various charities, amounting in the whole to 3,000*l.*; and she gave 500*l.*, 3*l.* per cent. consols, to H. K. I.; and "the remainder in the 3*l.* per cents." and other sums of stock, and any other sums of stock she might die possessed of, she left to her brothers, upon trust. The testatrix had neither at the date of the will nor at her death any sums of stock of her own upon which the will could operate:—

¹ 16 Jur. 21.

Innes v. Sayer.

Held, affirming the decision of Wigram, V. C., first, that the testatrix intended by this will to execute her powers of appointment; and that, these being specific gifts, the state of the testatrix's property at the date of the will and at her death might be looked at.

Secondly, that, notwithstanding that the power required the will to be signed and published in the presence of two or more witnesses, the will was a good execution of the power in favor of charities.

THIS was an appeal from a decree of the late Vice-Chancellor Wigram, reported 13 Jur. 402. The facts of the case are stated in the judgment. The arguments urged at the hearing, and the authorities then referred to, are so fully observed upon in the judgment, that it is unnecessary to state any of them, except those upon the question, whether this court would or would not aid the defective execution of the powers in favor of charities.

Rolt and *Faber*, in support of the appeal, contended for the negative of the proposition, and that there existed no authority for the affirmative, except that of text-writers. That this court has never gone further in favor of a relation or of a charity than to remedy the want of a surrender; but that such proceeded upon the intention of the donor, and of the rule of the court to carry out such intention in favor of a charity as far as possible: *The Attorney-General v. Rye*, 2 Vern. 453; but that that supposed intention of the donor could not be acted upon in the present case, for the only mind that gave was that of the donee of the power, but that the charity must take direct from the donor of the power. They also contended, that unless the court would supply the defect in favor of the legacy to H. K. Innes, it would not do so for the charities; citing *The Attorney-General v. Downing*, Amb. 571.

The Attorney-General, (Sir JOHN ROMILLY,) *Page Wood*, *Lloyd*, *Glasse*, *Headlam*, *Cankrien*, *Pirie*, and *Baggallay*, for other parties. They contended that the court would supply the defect in favor of the charities; and that it had been the constant habit of this court to do so, ever since the Statute of Charitable Uses, 43 Eliz. c. 4; citing *The Attorney-General v. Rye*, ubi sup.; *The Attorney-General v. Burdet*, 2 Vern. 755; *Piggot v. Penrice*, Gilb. Eq. Rep. 137; s. c., Pre. Ch. 471, and note at 473; *The Attorney-General v. Andrews*, 1 Ves. sen. 225; *The Attorney-General v. Tancred*, 1 Eden, 10; Amb. 351; 1 Sugd. Pow. 267, 6th ed.; Duke on Char. Uses, 110; *The Protestant Schools v. Richards*, 1 Dru. & W. 258; *The Attorney-General v. The Skinners Company*, 2 Russ. 407; *Chapman v. Gibson*, 3 Bro. C. C. 231; and 2 Bac. Ab. tit. "Charitable Uses," E.

Rolt, in reply.

November 5. LORD CHANCELLOR. This is an appeal from the decree of Wigram, V. C., made on the hearing of the cause on the 22d March, 1849. The material facts are as follows:—Judith Innes, at the date of her will, was entitled for life, under her marriage settlement, to the dividends of a sum of 1826*l.* 8*s.* 11*d.*, 3*l.* per cent. consols,

Innes v. Sayer.

with a power of appointment over a sum of 1000*l.* like stock, part thereof, by her last will and testament; and in default of appointment, the 1000*l.* stock was to go to her next of kin living at her death. Judith Innes was also entitled for life, under the will of her late husband, Thomas Innes, to the dividends of the several sums of 10,000*l.*, 3*l.* per cent. consols, 5000*l.* new 3*l.* 10*s.* per cents., 300*l.* long annuities, and 1,500*l.* 14*s.* 5*d.*, 3*l.* per cent. reduced annuities, with a

- power of appointment, by deed or will, over one third part of such sums, ("by her last will and testament in writing, to be by her signed and published in the presence of and attested by two or more witnesses;") and in default of appointment, the said four sums of stock were bequeathed to Alexander Innes and his children.

The testatrix, by her will, dated January, 1833, which was unattested, and did not refer to the power, gave to the treasurer for the time being of the Sailors' Home 1000*l.* in the 3*l.* per cent. consols; to the treasurer of the Strangers' Friend Society, 1000*l.* in the 3*l.* per cent. consols; to the British and Foreign Bible Society, 500*l.* in the 3*l.* per cent. consols; and the like sum to the Church Missionary Society, to be paid within six months after her decease; and she left the remainder in the 3*l.* per cents., with certain other sums of stock, and any other property she might die possessed of, to her brothers, upon the trusts therein named.¹ The testatrix subsequently made eight other unattested testamentary papers, at the foot of the last of which, dated the 1st September, 1836, she had written, "This will has not been witnessed, as I intend, if I am spared, to write it out fair." The question is, whether these testamentary papers ought to be deemed to operate as valid appointments in exercise of her before-mentioned powers.

The testatrix died in June, 1844, and her will and other testamentary papers were admitted to probate. The present bill was filed by one of the four children of Alexander Innes, (the residuary legatee of Thomas Innes,) against the surviving executor, the other children of Alexander Innes, and the treasurers of the different charities to whom legacies had been left by the will of Judith Innes, praying that one fourth part of the sums of stock over which she had powers of appointment might be transferred to the plaintiff. The Vice-Chancellor, by his decree, declared that the testatrix, by her said will, intended to execute the power of appointment given her by the will of her late husband, and that the defective execution ought to be supplied in favor of the four charities, and directed the stock to be transferred accordingly. Against this decree the plaintiff has appealed.

The first question to be decided is, whether the will of Judith Innes operated as an execution of the powers given her by her marriage settlement, and by the will of her husband. This question involves two others: first, whether the testatrix intended, by the will which she made, to execute her powers of appointment; secondly, admitting that she did so intend, whether the court will hold the powers to

¹ She also gave to H. K. Innes 500*l.* in the 3*l.* per cent. consols.

Innes v. Sayer.

be sufficiently executed in favor of the charities, notwithstanding the non-attestation of the will of the testatrix in conformity with the power. With respect to the intention to execute by her will the powers which she possessed under her husband's will, and under her marriage settlement, I am of opinion that such intention may be collected from the words of the will. The general rules relating to this point ought to be considered as so well established as to be no longer open to doubt, or subject to argument. The matter of doubt and difficulty as to this point is, whether the facts and circumstances of this particular case do or do not fall within the established rules.

Although I am not at liberty to refer to the very valuable modern work on Powers as authority, (and I hope it will be many years before the public will sustain the loss which will give it the stamp of authority,) I may yet adopt the usual terse and appropriate language in which the result of the authorities is stated in that work. In 1 *Sudg. Pow.* 373, 6th ed., 356, 7th ed., it is stated, "A donee of a power may execute it without referring to it, or taking the slightest notice of it, provided the intention to execute it appears." "Where, however, the power is not referred to, the property comprised in it must be mentioned, so as to manifest that the disposition was intended to operate over it. The donee must do such an act as shows that he has in view the thing of which he had a power to dispose." *Id.* 385, 6th ed., 367, 7th ed. And in a subsequent page he says, "Slight circumstances of conformity or reference will not amount to a sufficient indication of the intention." *Id.* 387, 6th ed., 370, 7th ed. Such being the established rules of construction applicable to this subject, the question in this case is, whether the specific property to which the powers relate, is mentioned or referred to in the will in question. I think it is so mentioned and referred to, and I adopt the reasons and arguments of the learned judge below in support of that conclusion. I agree that the words "the remainder in the 3*l*. per cents," satisfactorily show that the legacies previously given were part of a larger amount of stock in that specific fund. The definite article "the" marks out some specific or particular sum of stock as distinct from a gift of stock of that description in general; and whether the specific stock referred to might mean stock which the testatrix might purchase between the date of her will and her death, as it has been contended, or stock existing at the date of the will, still the gift is specific, as it is a gift of stock existing at one of those times; and the expression "the remainder in the 3*l*. per cents." cannot be construed to import a direction to purchase some 3*l*. per cents., as in the case of a general bequest of a given amount of that stock.

As, then, the words can only be satisfied by referring them to specific stock existing either at the date of the will or at the death of the testatrix, it is necessary for the court to inquire as to the existence of stock at those times to which the words can be referred; and since there is no stock of her own to which they can be referred at the death of the testatrix, but there is stock, subject to the powers of appointment, to which they can be applied — stock existing both at the date of the will and at the death of the testatrix — the court must refer

them to that stock in order to give some effect to the disposition which they purport to make. If the will were regarded as speaking from its date, there could be no doubt but that the words must be referred to the stock over which the power of appointment extends, for at that time there was no other stock; and if the will speaks from the death, the result must be the same, for there was no other stock even at that time.

It was contended, however, that the words might be satisfied by referring them to some stock which the testatrix supposed to be existing at the time of her death. But when the testatrix had no 3*l*. per cents. of her own, either at the date of her will or afterwards, and there is no indication in the will of an intention to purchase any such stock, or of any expectation of her becoming possessed of any such stock, I think it would be a most forced and unnatural construction to hold that the specific stock referred to was specific stock which never existed in fact, and of the expected existence of which at a future time, in the mind of the testatrix, there is not the slightest evidence or indication. At all events, I think the most natural construction is to interpret the words as referring to the specific fund in actual existence at the date of the will, rather than to possible specific stock, the possibility of the existence of which there is no proof whatever that the testatrix ever contemplated. If this construction required further support, I think it is to be found in the next words, "and three separate sums in the new 3*l*. 10*s*. per cents.," which palpably mean the three specific sums existing at the date of the will. On the other hand, I do not consider that the subsequent words, "and any other property I may die possessed of, of what nature or kind soever," in the least degree affect the construction of the words "the remainder in the 3*l*. per cents.," further than this — that at most they only import an expectation that the specific stock previously described would exist at the time of her death, and an intention to dispose not only of that stock, but also of all other property which she might die possessed of, whether it were property of which she was possessed at the date of her will, or property which she might afterwards acquire.

It was argued that evidence of the state of the property at the date of the will is inadmissible in this case; and Sir James Wigram's work on Evidence was quoted in support of this view; but the very contrary is maintained in that work. According to the fifth proposition laid down in that book, "for the purpose of determining the *subject* of disposition a court may inquire into every *material* fact relative to the property which is claimed as the subject of disposition, and into the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to *identify the things intended* by the testator." Wig. Ev. 51, 3rd ed. It is true that there have been many cases in which the court has held, that a power was not executed even where the words *might* have referred to the power; but in those cases the words could be fully satisfied by referring them to the testator's own property. And there have been also various cases in which the court has refused to take into consideration the state of the testator's property at the date of his will, or at the time

Innes v. Sayer.

of his death; but in these cases the disposition was not *prima facie* specific, as I think it is in this will. In *Lewis v. Lewellyn*, Turn. & R. 104, a testator having a power of appointment of freeholds and copyholds, and having other freeholds of his own, but no copyholds, charged all his freehold and copyhold estate with the payment of debts, and subject thereto he devised and bequeathed all his real and personal estate. This was held to be a good execution of the power as to the copyholds, but not as to the freeholds. In *Napier v. Napier*, 1 Sim. 28, a testator made a general devise of all his land in nine parishes, in five of which he had only land in fee, in three others he had no land of his own, but there was land over which he had a power of appointment. In the remaining parish he had land in fee, and also land over which his power of appointment extended. On the authority of *Lewis v. Lewellyn*, it was held that the land in the parish which was subject to his power did not pass, although all the other land passed, and although it was insisted that, in effect, there was a reference to the power; for the admission, that the land did pass in the three parishes in which the deviser had only land subject to the power, was an express admission that the deviser had the power in view at the time of making his will. These cases only prove, that where the testator has property of his own, and a power of appointing other property, and the words he uses may be fully satisfied by referring them to his own property, they will not be referred to the property over which he has only a power of appointment.

In *Webb v. Honnor*, 1 J. & W. 353, it was held that a bequest of the whole of the testator's personality, "consisting of money invested in any of the public funds, household furniture," &c., did not operate as an execution of a power of appointment over a sum in the funds. The Master of the Rolls said, "In this instrument there is nothing to show that the testator meant to dispose of any thing but his own property. Every part of it is satisfied by giving all that he was possessed of." The decision in *Hughes v. Turner*, 3 My. & K. 666, that a power was not executed, proceeded on the ground that it was not proved that the testatrix by her will professed to dispose of that which she could only dispose of under her power; but that even if she did, still reference to part of a subject, or to some of many subjects, is not sufficient to make the will operate as an execution of the power as to such parts or such subjects as are not referred to. In *Jones v. Tucker*, 2 Mer. 533, the testatrix had a power of appointing 100*l.*, and, without referring to the power, she bequeathed the sum of 100*l.*, having no personal property at the time of her death except some furniture of small value. The court held, that the state of the

erty at the time of her death, could not be considered, er was not executed. In *Jones v. Curry*, 1 Swans. 66, the power of appointing property partly consisting of real ly of household furniture, linen, and plate. A gift of d effects, of whatever denomination, and of his house- with linen and plate, was held not to be an execution The Master of the Rolls said, "Whatever is the a testator's property to satisfy the terms of the will,

Innes v. Sayer.

and whatever may be the conviction of the court of his intention to execute the power, the state of his personality at the time of the will, or of the death, cannot be examined for the purpose of collecting evidence of his intention. In the present case the will purports to pass the property of the testator in terms appropriate for that purpose, without referring to the power, or to any thing which is the subject of it." In *Nannock v. Horton*, 7 Ves. 391, the bequest was of 2000*l.*, 3*l.* per cent. consolidated bank annuities. The Lord Chancellor said, (p. 399,) "That sum is so given that it cannot be disputed, that if, when he died, he had not had any stock, but had other personal estate, that stock must have been purchased for the legatees. It is not specific. It would operate only as a direction to purchase stock if he died without any stock; and it is very difficult to say, that what would amount to that direction in a will is to be construed into a gift of that which was not his to give, but over which he had a power."

The case of *Andrews v. Emmot*, 2 Bro. C. C. 297, and the others of that class, are clear and distinct, and positive and express to the point, that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was executing the power or not. In *Andrews v. Emmot* the testator did not refer either to the power or to the subject of it. Lord Thurlow said, "If a man disposes of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried by any case further than this; and it would be cruel to do it, as it would be throwing the property of testators into utter confusion;" and he added, "You must not go out of the instrument itself to gather the construction of it, as to inquire into the testator's situation, in order from thence to gather what it is probable he meant." From some of the decisions in these cases it might be inferred, that in no instance can the court have taken into account the state of the property in construing a will; but, as Alderson, B., remarked in *Davis v. Quarterman*, 4 Y. & C. 262, "all dicta should be construed according to the circumstances of the case in which they are found;" and the cases in which these decisions are found are cases in which the gift was *prima facie* a general gift. Whereas, in *Shuttleworth v. Greaves*, 4 My. & C. 37, Lord Cottingham said, "In every specific devise or bequest it is clearly competent and necessary to inquire as to the things specifically devised or bequeathed." And this doctrine was acted on in *Mackinley v. Sison*, 8 Sim., 561, where it may be questionable if it was justifiable to do so. There a testatrix directed several pecuniary legacies to be paid out of the money invested in her name in the 4*l.* per cent. government annuities. She had not, at the time of making her will, or of her decease, any stock standing in her name at all, nor any in the name of the trustees, except some 3*l.* per cents.; and as she had no property at any time to pay the legatees except that fund, it was held that the description contained in her will, although erroneous, sufficiently pointed out the subject of the power, and that the will was a good execution of the power. Upon this point, therefore, I have only

Innes v. Sayer.

to repeat, that I think the judgment of the Vice-Chancellor was right, and ought to be affirmed.

The next question relates to the effect of the absence of attestation to the will by witnesses. The will contained the form of an attestation, and a note to the following purport:—"That the will had not been witnessed, as I intend, if I am spared, to write it out fair." From these circumstances it has been argued, that admitting that she intended to execute the power, yet her intention was only inchoate. It is plain, however, from the care which she took, in a note to another codicil, to state that an interlineation or erasure had been made by herself, that she regarded as valid and effectual the testamentary disposition purported to be made by the will and codicils subjoined to it; and that she so intended it to be, in case she should not be spared to write out a fair copy; although it was her intention, if spared, to make a fair copy, and have the same attested, for the purpose of preventing all disputes. It cannot, then, be successfully contended, that her intention to make a will of her own property was only inchoate; and, indeed, that would be contrary to the very fact that the paper had been admitted to probate as an actual will. And if it cannot be contended that her intention to dispose of her own property was inchoate, neither can it be maintained that her design to execute her powers of appointment was inchoate. She may have known or remembered that she had a power of appointment, without having known or remembered the formalities by which it was to be executed; or if she knew or remembered those formalities, she may have considered them as not absolutely necessary to the validity of the execution of the power, but as only expedient to prevent disputes as to the fact of its existence. I have arrived at the conclusion that the testatrix intended by the will that she made to execute the powers of appointment; and the question which then arises is, whether the powers ought to be deemed to have been well exercised in favor of the charities, notwithstanding the will was not executed in conformity with the requisitions of the power. Upon this point I may say, as I observed in regard to the point first mentioned, that it ought to be considered as established by judicial decision, that a power, well exercised in all other respects, will, in favor of the charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power. Those decisions are too familiar to the bar to render it necessary for me to refer to them by name, as several of them were cited at the bar.

With regard to the attestation being required by the terms of the instrument or will executing the powers, there is no valid objection to dispensing with attestation, on the ground of a supposed contravention of the intent of the author of the power. Attestation is merely required by him for the purpose of preventing fraud and disputes as to the fact of execution; and in the case of a charity there is much less danger than in a case where an individual is to benefit by the execution of the powers; and, indeed, generally speaking, no danger at all. Assuming the powers conferred upon Mrs. Innes by

 Bolton v. Powell.—Howard v. Earle.

her marriage settlement, and by her husband's will, to have been well executed, which I hold them to have been, the only other objection to the order to which the appeal refers is, that the effect of the order is to leave the charities at liberty to take the whole of their legacies out of the stock to which the power given by the will of Thomas Innes relates, it being contended by the residuary legatee under that will, that the charity legacies ought to be taken out of the stock mentioned in Thomas Innes' will, and out of the 1000*l.* which the testatrix had the power to charge under her marriage settlement, proportionably. Upon this question I must observe, that the parties interested in the 1000*l.*, which it is contended ought to contribute to the payment of the charity legacies, are not before the court in this case, to which alone the appeal refers. Neither has the court, in this cause, power over that fund; and, under such circumstances, I can make no effective decree, under this appeal, to charge that fund; and I see no ground to call upon the court to restrain the charities from taking their legacies out of the fund which is clearly subject to the payment, and which is subject to the order of the court, to drive the charities to another suit, subject to further delay and expense. It is also to be remarked, that, in general, the principle of marshalling assets is applied to a case where two parties can each attain full justice by marshalling, without injury to a third; but in this case, what is called marshalling would have the effect of taking from the persons entitled to the 1000*l.* under the marriage settlement, for the benefit of the legatee under Thomas Innes' will. I think I cannot make any order to throw a proportion of the charity legacies on the settlement fund; and therefore the decree of the Vice-Chancellor must be affirmed, and the

Appeal dismissed.

BOLTON v. POWELL.¹ HOWARD v. EARLE.

June 13 and 14, 1851.

Bill to enforce Administration Bond.

The administratrix *de bonis non* of an intestate cannot in equity sue upon or enforce the administration bond given to the ordinary by the original administrator, against his estate and the co-sureties in the bond, without showing some special circumstances why the ordinary himself did not institute the proceedings.

Quære, whether the ordinary himself can institute a suit in equity in his own name to enforce such bond?

DAVID BOLTON died intestate in 1814, leaving several children him surviving, and his son, William Bolton, procured letters of administration of the intestate's estate to be granted to him by the Prerogative Court of Canterbury, shortly after the intestate's decease. On

Bolton v. Powell.—Howard v. Earle.

that occasion William Bolton, with two sureties, viz., Harry Cook and John Leopard, entered into the usual administration bond in the penal sum of 12,000*l.* with the archbishop, dated the 18th October, 1815, conditioned to be void if the said William Bolton made, or caused to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, and exhibited the same in the registry of the said Prerogative Court on or before the last day of April then next; and the same goods, &c., and all other the goods, &c., of the said deceased at the time of his death which at any time after should come to the hands or possession of the said William Bolton, or into the hands or possession of any other person or persons for him, did well and truly administer according to law, and further did make, or cause to be made, a true and just account of his said administration on or before the last day of October which should be in the year 1816; and all the rest and residue of the said goods, &c., which should be found remaining on the said administration accounts (the same being first examined and allowed by the judge or judges for the time being of the said court) should deliver and pay unto such person or persons respectively as the said judge or judges by his or their decree or sentence (pursuant to the true intent and meaning of an act intituled, "An Act for the better settling of Intestates' Estates,") should limit and appoint; and, if it should thereafter appear that any last will and testament was made by the said deceased, and the executors therein named did exhibit the same in the said court, making request to have it allowed and approved accordingly, should deliver up the said letters of administration. William Bolton, as such administrator, possessed himself of the intestate's personal estate, and misapplied a large portion thereof, and at his death, which took place in 1817, there was due from him, as such administrator, to the intestate's estate, the sum of 6899*l.*

In 1817, shortly after the death of William Bolton, a suit was instituted by some of the children and next of kin of the intestate, against Harry Cook, who was the executor of William Bolton, for an account of the personal estate of the intestate, and the due administration thereof; and by the master's report, made in pursuance of the decree in this suit, and dated the 1st July, 1831, he found that the sum of 6899*l.* 17*s.* 1*d.* was due from William Bolton, as the administrator of the intestate. Shortly after the decease of William Bolton, a creditor's suit was also instituted by certain parties of the name of Smith, to administer his personal estate. Under the decree in that suit a claim was taken in by the administratrix *de bonis non* of David Bolton for the said sum of 6899*l.* 17*s.* 1*d.*, which the master, by his report, dated the 13th June, 1831, found to be due; and in pursuance of the order made on further directions in that suit, dated the 25th July, 1832, the sum of 900*l.*, being a proportionate part of the residue of the personal estate of William Bolton, after paying the costs of the suit, was applied in paying the said debt of 6899*l.* 17*s.* 1*d.*, whereby it was reduced to 5795*l.* 5*s.* 11*d.* Charlotte Bolton, the plaintiff in the first suit, one of the children of David Bolton, and his administratrix *de bonis non*, on the 3d October, 1832, filed her bill in this

Bolton v. Powell. 2.—Howard v. Earle.

cause against the parties interested in the real estate of William Bolton, and Harry Cook, the surviving surety in the administration bond, and the assignees under his bankruptcy, and against the personal representatives of the other surety, who was dead, and the personal representatives of the Archbishop of Canterbury, the obligee in the bond, stating the above-mentioned facts, and also stating, that by an order of the Prerogative Court of Canterbury, made on the application of the plaintiff, and upon proof of the institution or intended institution of this suit, it was ordered that the aforesaid bond should be attended with in the Court of Chancery, as might be requisite and necessary for the furtherance of justice, to the end and intent that the said bond might be put in suit against the estates of William Bolton and the parties liable thereto, for the benefit of the estate of the intestate; and charging that there was no other specialty debt of William Bolton besides the said debt of 5795*l.* 5*s.* 11*d.*, and that the defendant, Charles Manners Sutton, the personal representative of the archbishop, was a trustee of the bond, and bound to enforce the same for the benefit of the estate of David Bolton, but that he declined to join the plaintiff in the suit; and praying a declaration that the said sum of 5795*l.* 5*s.* 11*d.* was a specialty debt of the testator, William Bolton, due and recoverable under the said bond, and that the defendant, Charles Manners Sutton, was a trustee of the bond for the benefit of the intestate's estate; and that it might be declared that the said debt, with interest from the death of William Bolton, was due to the plaintiff, as the personal representative of David Bolton, by the said William Bolton, John Leopard, and Harry Cook, and that the same ought to be paid accordingly; and for a sale of a sufficient part of the real estates of William Bolton for the payment thereof, and for the necessary accounts and directions for the purposes aforesaid.

This suit came on to be heard in 1836, but an objection having been taken by some of the defendants, that as the suit was instituted by the plaintiff, not only as legal personal representative, but as one of the next of kin of David Bolton, on behalf of herself and all the other next of kin, and asked for an administration of the fund, all the other next of kin ought to be before the court; and the cause stood over to make all the next of kin and other persons parties. The plaintiff, Charlotte Bolton, afterwards died; and in October, 1848, a supplemental bill was filed by Charlotte Augusta Amelia Howard, (formerly Bolton,) who had taken out administration *de bonis non* to the intestate, by William Hubbard, her next friend; and her husband, Frank Howard, was also named as a co-plaintiff. Charlotte Augusta Amelia Howard was also one of the next of kin of the intestate. The bill prayed the usual supplemental decree. Although it was alleged in the original bill that the personal representative of the archbishop declined to join in suing upon the bond, there was no evidence of any such refusal. The causes now came on to be heard; and the objection was taken that the plaintiff could not, either as administratrix *de bonis non* of the intestate, or as one of his next of kin, enforce the bond against the real estate of the obligor or his sureties, unless some special circumstances were stated and proved, showing grounds why

Bolton v. Powell. → Howard v. Earle.

a suit was not instituted by the archbishop himself, or his representative.

Roupell and Glasse, for the plaintiffs.

R. Palmer, Lloyd, Walpole, T. H. Hall, Willcock, Lewis, Hoare, Shadwell, and Whitbread, for the several defendants.

The following cases were cited:— *Parker v. Young*, 6 Beav. 261; *Hammond v. Messenger*, 9 Sim. 327; *Barker v. Birch*, 1 De G. & S. 376; *Bowsher v. Watkins*, 1 Russ. & M. 277; *Edwards v. Freeman*, 2 P. Wms. 435; and *Ashly v. Baillie*, 2 Ves. sen. 368.

SIR J. ROMILLY, M. R. The question in this case is, whether the administrator *de bonis non* of the goods of a testator can file a bill in this court to enforce the bond given to the ordinary by the original administrator; and, upon general principles, I am satisfied that an administrator *de bonis non* cannot sustain a suit in this court for the purpose of making the real estate of the administrator who gave his bond, and the sureties who joined with him in giving that bond, being the simple administration bond to the ordinary, liable; that he cannot do this, unless the suit be instituted in the name of the ordinary, except there be some very special circumstances to give the court jurisdiction. I am, therefore, of opinion, that the plaintiff cannot succeed in this suit; and the case is certainly not one in which the court would be disposed very strongly to stretch any principles of equity in favor of the plaintiff.

The intestate, whose estate was improperly administered, died in 1814; his administrator, who improperly dissipated the estate, died in June, 1817; and therefore the breach of the bond, in respect of which it became enforceable against the estate of William Bolton, had arisen and existed. In the year 1817, two suits were instituted for the administration of the estate of William Bolton, one by the administratrix *de bonis non* of the original testator, and the other by creditors. It is manifest that this bond, if it were a debt (which I assume it to be) against the estate of William Bolton, might have been enforced at that time. If it had been proved against his estate, it would probably, so far as I understand the statement of the case, have exhausted all the estate; for they seem to have been simple contract creditors who instituted the suit, and this would have been a specialty debt. The personal estate would not have paid it in full; but there was the real estate of William Bolton which remained to be administered, and nothing could be more easy than (assuming the court to have jurisdiction, either in the name of the ordinary or otherwise) for the person interested to have instituted proceedings against the real estate of William Bolton for the purpose of enforcing the payment of the bond. No steps whatever for this purpose were taken till the year 1832; and although that is no bar in equity or at law upon a specialty debt, (only fifteen years having elapsed,) yet the proper course, as it appears to me, was to have instituted proceedings in the courts of

Bolton v. Powell. — Howard v. Earle.

common law, in the name of the archbishop, for the purpose of enforcing the penalty upon the bond. I am confirmed in this view of the case by the circumstance that no case has been found in equity (though, if the jurisdiction existed in equity, there must have been many such cases) in which any such suit was instituted in the first instance in a court of equity. All the cases, with the exception of that in 6 Beav., are cases in which a suit has been instituted against the obligor of the bond, apparently for the whole amount of the penalty, and he has come into equity to stay the action, and has succeeded in staying it upon this condition, viz., that, by consent, jurisdiction should be given to the court to take an account of the assets of the testator which he ought to have administered, and to make him liable to pay the amount found due upon that account.

In the case of *Parker v. Young*, Lord Langdale expressly decided that no suit would lie in this court by a person claiming the benefit of the bond, without having obtained the sanction of the Ecclesiastical Court for putting the bond in suit; but he did not decide that a suit would not lie in this court exactly in the same circumstances, provided the sanction of the Ecclesiastical Court had been obtained for that purpose, though his observations appear to me to tend in that direction. He says — "In the absence of all authority on the subject, it does not appear to me that any one can be a specialty creditor under a bond which he does not produce, and which is not under his control, which was not executed to him or to his intestate, but was executed to a public officer, and remains subject to the judicial control of the Ecclesiastical Court, which has discretion to determine whether the bond should be put in suit or not, and on what terms." If the ordinary sued here, he would have the entire control over the bond, and be enabled to deal with it as he thought fit. This suit was instituted in 1832, and it is to be observed that, as respects one defendant, Harry Cook, the case of *Hammond v. Messenger* is precisely and directly in point; indeed, this is a stronger case than that of *Hammond v. Messenger*. Harry Cook was then alive, and was one of the sureties in the bond; and consequently, as against him, the suit ought to have been simply an action at law; and assuming — which I am of opinion ought not to be assumed — that, in favor of the plaintiff, this order of the Ecclesiastical Court amounts to an assignment of the bond to the plaintiff, yet, as against Harry Cook, the case of *Hammond v. Messenger* is a decisive authority that, as against him at least, the bond could only be enforced by an action at law, and that no suit could be maintained in this court.

Then, it is said, jurisdiction is given, with respect to the others, by reason of their being dead, and that therefore there is administration of assets, and that the bond might be proved as an ordinary debt. Assuming it to be true — which I think is not established — that where there is a person who is the legal creditor, and he holds the debt expressly in trust for certain other persons, those persons could maintain a suit for the administration of assets in this court, — assuming that to be the case, it is by no means equally clear, that, in the case of a constructive trust, the same right would accrue, at least in the absence

Bolton v. Powell.—Howard v. Earle.

of any special circumstances. I assume the plaintiff to be interested in the bond, but certainly not as a direct *cestui que trust*. That cannot be alleged, because she is not named. The bond is for four purposes: first, to make an inventory, which creates no trust at all; there is the third, to render a true account, to which the same observation may be applied. With respect to the fourth, no trust exists; with respect to the second, some question arises, because it is provided that the bond is to be forfeited, unless the person who is the obligor in the bond shall well and truly administer the estate according to law.

It may be said — and I think justly said — that persons who are interested in that estate are entitled to take such proceedings as the court will allow, in order to enforce the due administration of the estate; but it would be a very strange thing to say (assuming that that creates a constructive trust) that persons interested in the estate, or persons representing the estate, are to be at liberty to prove a debt under the administration of assets, (which is the most favorable way in which I can put it for the plaintiff,) without showing the court why it is that the obligee in the bond, to whom it is expressly given, does not come forward, and does not bind himself with respect to any proceedings to be taken upon the bond. If that be so in the case of an ordinary obligee, I think the observation is stronger in the case of a public officer of the Ecclesiastical Court, and that no person ought to be allowed to sue for the enforcement of the bond without explaining in some strong and special manner, and without proving some strong and special circumstances, which prevent him from obtaining the sanction and using the name of that person for instituting a suit in this court. If the fact be, (which possibly may be the case,) that upon application no suit could be instituted in this court in the name of the ordinary, and that the ordinary would not allow his name to be used for the purpose of a suit in equity, it is only one additional fact to prove this in my mind, that the plaintiff has mistaken the court in which the proceedings ought to be instituted, in coming, in the first instance, to a court of equity.

It is said by Mr. Roupell, (and there is weight in the observation undoubtedly,) that, supposing the plaintiff proceeded at law, the money would be paid, or at least nominally paid, to the Archbishop of Canterbury, and the archbishop could not retain it; but I am of opinion that that is not a just objection to the opinion which I have formed. In fact, the archbishop would not receive it, because, though the suit were instituted in the name of the archbishop, the real plaintiff would receive the money; and she would have to prove, in the first place, that she was the next of kin, and entitled as next of kin, in which case it would be necessary to prove that all the debts were satisfied, or that she was a creditor, and had not received her debt. Whether she would be entitled to recover as legal personal representative, I do not stay to inquire; but assuming that she would, she would then receive the money in her character as representative, and, as such, any one of the persons entitled to the benefit of that, might sue her in this court, because she would have recovered a judgment in her personal representative character. I think the case of *Barker v.*

Re Hartnall's Will.

Birch, and the case of *Bourker v. Watkins*, and all that class of cases, in which the court will not allow a person, interested to the full extent of a debt due to the testator's estate, to sue, unless some special circumstances are established to show that they are entitled to sue, have a bearing on this case, and confirm me in the view I have adopted and the conclusion I have come to. All I decide in this case is—and I am desirous not to decide any thing further—that the legal personal representative, the administratrix *de bonis non* of an original intestate, cannot sue upon or enforce the bond given to the Archbishop of Canterbury by the original administrator against his estate, and against the co-sureties in the bond, without showing some special circumstances why the archbishop himself did not institute the proceedings; and I wish carefully to guard myself against determining that the archbishop himself could sue, even if the suit were instituted in his name. For the reasons which I have stated, I think this bill cannot be maintained. At one time I thought the proper course which this court ought to have taken was to dismiss the bill, without costs, because it appeared to me that the question might have been raised upon demurrer. But Mr. Chandless has read to me a passage in the bill, in which it is stated that the ordinary had refused to institute a suit, or to become a co-plaintiff with the plaintiff for this purpose. I think that makes a difference, and might make it difficult for the defendants to have demurred to the bill.

A discussion subsequently took place respecting costs, the plaintiffs contending, as to some of the defendants, that they ought not to have the costs occasioned by the objection taken for want of parties in 1836, inasmuch as they might then have taken the objection now urged for want of equity, and thus prevented a great deal of expense. To this it was replied, that the bill contained an allegation that the archbishop's representative declined to sue on the bond, and the defendants had a right to presume such to be the fact.

His honor ultimately dismissed the bill, with costs, as against all the defendants.

*Re THE TRUSTEE ACT, 1850; Re HARTNALL'S WILL.*¹

December 6, 1851.

Trustee Act, 1850, s. 23 — "Sole Trustee" — Construction.

Two representatives of a sole trustee, deceased, in whose name a sum of stock was standing, refused, for more than twenty-eight days after request in writing, to receive the dividends:—

¹ 16 Jur. 33.

Re Hartnall's Will.

Held, that the court had power to vest the right to receive these dividends in the petitioner, under sect. 23 of the Trustee Act, 1850, although that section seemed to apply in words only to the case of a sole trustee so refusing.

Held, also, that the order might be made to refer to arrears of dividends as well as future payments.

THIS was a petition for vesting in the petitioner, by an order under the Trustee Act of 1850, the arrears and future payments of the dividends on a certain sum of stock still standing in the name of the trustee thereof, who was dead. By his will, dated the 8th March, 1823, G. Hartnall bequeathed certain personal property to trustees, named Woodland and Poole, upon trust for the petitioner for life, and after her decease upon the further trusts therein mentioned. In 1824 the testator died. In December of that year Poole alone proved the will, Woodland having renounced probate, and refused to accept the trusts. Poole acted as sole trustee, and the stock in question was vested in his name as sole trustee of the will. On the 27th July, 1830, Poole died, and letters of administration of his estate and effects were subsequently granted to T. J. Poole and C. Burt: they refused to act in the trusts of Hartnall's will, or to receive the dividends of the stock. There was no power in Hartnall's will to appoint new trustees thereof. The stock still remained in the name of Poole, and the dividends thereon were accumulating. The petition prayed that the right to receive the arrears and future payments of these dividends might be vested in the petitioner, or some other proper person.

Freeling, for the petition, said that T. J. Poole and C. Burt had been duly requested, more than twenty-eight days before the petition, to receive the dividends on this stock, but they refused to interfere. He suggested that there was some difficulty upon the words of the Trustee Act, sect. 23 applying, in terms, to the case of a sole trustee refusing to receive the dividends. Here there were two who refused. But this was probably cured, he submitted, by the interpretation clause, sect. 2, which enacted, that any word importing the singular number might mean the plural; also the 24th clause, in contradistinction to the 23rd, provided for the case of one of several trustees refusing to receive dividends. That showed that the 23d clause was intended to apply to the case of more than one trustee refusing. In the 18th section the word "sole" was used to apply to several persons.

[SIR J. PARKER, V. C. Persons who together are solely entitled.]

That must also be the meaning here, or there is nothing in the act to embrace the case where more than one trustee refuses to receive dividends, &c.

SIR J. PARKER, V. C. You contend that sec. 24 applies to the case of one of several trustees refusing, and sect. 23 to the case of a sole trustee, or, if more than one, all the trustees refusing. I think that must be so, but it is rather a strange use of the interpretation clause.

Freeling directed attention to that part of the prayer of the petition

Ex parte Gay.

which referred to the arrears of the dividends. Sec. 23, he said, seemed to refer to the general dividends.

SIR J. PARKER, V. C. I think the power of the court extends to the arrears of dividends under this section.

*Re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849;
Re THE LONDON AND BIRMINGHAM EXTENSION AND NORTHAMPTON,
DAVENTRY, AND WARWICK RAILWAY CO.; Ex parte GAY.*¹

December 19, 1851.

Call — Contributories — Costs.

The Master to whom is committed the winding up of an abortive association for the formation of a railway company, in an urgent case, may make a call, for costs incurred by the Official Manager for the common benefit of all the contributories, upon contributories clearly liable as such, although there may possibly be a certain class of them primarily liable, the question of prior liability being left to be afterwards determined. But it seems that such a call ought not to be made to pay the debts of the company until the question of primary liability is determined.

THIS was a motion on the part of John Gay to discharge an order of the Master charged with the winding-up of the above-named company, dated the 3d December, 1851, whereby he ordered that a call of 1*l.* 13*s.* per share should be made on the contributories of the said company included in class 1, as settled by him, (of which class the said John Gay was a contributory,) to provide a fund for payment of the costs of winding up the said company; and that each of the said contributories, on the 31st December, 1851, should pay to the official manager the balance which would be due from him after debiting his account in the said company's books with such call. The said company was projected in 1845, and a large number of shares were issued, the deposits upon which amounted to about 19,000*l.* On the 16th August, 1845, an indenture was made between certain persons of the first and second parts, and the subscribers to the undertaking of the third part, whereby it was provided that certain persons should be appointed the managing committee, and they were thereby empowered to appoint bankers, engineers, surveyors, clerks, and other persons, and to pay them such salaries as they might deem right, and to enter into any contract for making the necessary survey, and all other measures necessary to the application to parliament for carrying out the project. They were also authorized to apply the moneys which might be paid as deposits to the discharge of the expenses which might be so incurred. The deed then contained an agreement, that, if the intended application to parliament should not be successful, the

¹ 16 Jur. 34.

Ex parte Gay.

parties thereto should bear and pay all the costs and expenses which should have been incurred, whether before or after the execution thereof, with a view to the establishment or promotion of the said undertaking, whether in or about the making, obtaining, or completing any surveys or estimates for the said railway, branches, and works, or any of them, or on account of any solicitors' charges, counsel's fees, and the costs of or incidental to preparing, applying for, or procuring any such act as aforesaid, travelling expenses, and all other costs and charges of every description incidental or preparatory to the proposed undertaking, — all such expenses, costs, and charges to be assessed ratably on the sum or sums respectively subscribed by the parties thereto.

Considerable expenses were afterwards incurred in employing solicitors, engineers, and local agents, with a view to the application to parliament. That application did not succeed, and the project was abandoned. The managing committee exhausted the deposits in these expenses, and in payment of 10,000*l.* in part of the purchase money of the Warwick and Knapton Canal, which they had contracted to buy. Under these circumstances, in May, 1849, an order was made to wind up the affairs of the company under the above acts, and in June, 1849, the official manager was appointed. Considerable costs were incurred in the Master's office, in opposing claims made against the company, and in settling the list of contributories. Claims were brought against the company amounting in the whole to the sum of 21,000*l.* These claims the official manager successfully resisted, excepting to the amount of 2,700*l.* One of the claims so opposed was made by a gentleman named Prichard, the surveyor and engineer employed by the company, who, by the direction of the Master, under an order dated the 21st March, 1851, brought an action for that sum, which was still pending, against the official manager, and which the official manager was directed to defend. Certain documents were required for the defence to this action, which were in the hands of a Mr. Hall, who claimed a lien upon them. It was necessary to pay off this lien, as well as to provide funds to defend the action in other respects. Moreover, in May, 1850, after taking the opinion of counsel in the matter, the Master had directed a suit to be instituted by the official manager, in the name of a contributory as plaintiff, against the Warwick and Knapton Canal Company, to recover the 10,000*l.* so paid to them. Various proceedings had been taken in this suit, and considerable expenses incurred, and the suit was still pending. To meet all these expenses, amounting to between 14,000*l.* and 15,000*l.*, the official manager had only received a sum of 10*l.*, which was the balance in the hands of the company's bankers to their credit, and a further sum of 70*l.* from some of the contributories to the company in anticipation of calls.

The Master had divided the contributories to the company into two classes: class 1 consisting of those who had executed the subscribers' deed; class 2, of those who had not executed it. By an order dated the 22d July, 1851, the Master directed that a call of 1*l.* 13*s.* per share should be made on the first class of contributories

Ex parte Gay.

to the company, to be paid on the 22d August, 1851, as therein mentioned. This call was intended to provide for the debts of the company, as well as the expenses incurred in winding it up. John Gay appealed to the court against this call. On the 31st July, 1851, Knight Bruce, V. C., discharged the Master's order, on the ground that there existed a contention as to the priority and proportion of their liability between those contributories who formed the managing committee and those who did not, the latter claiming that the managing committee were, by reason of large sums which they had not accounted for, liable in the first instance to the call at least in a much greater degree; and because he thought that this question should first be investigated by the Master. His honor, in giving judgment, however, said that he could conceive a case in which there might be such an urgent necessity for a call as to render it not unfit, for a time at least, to disregard that contention, and to make the call at once. The Master, conceiving that there was an urgent necessity for raising money to meet the expenses incurred by the official manager, who was without assets either to pay the liabilities already incurred, or to prosecute the proceedings further, on the 3d December, 1851, made the call now in question for these purposes only, and not to pay the debts of the company; and he alleged, in addition to the circumstances above mentioned, that the managing committee were unable to pay, or it would be impossible to recover from them the amount intended to be raised by this call, and it was therefore useless to inquire as to their primary liability, and that the official manager had no funds even to conduct such an inquiry; and further, that the persons upon whom the call was intended to be made had all executed the subscribers' contract, and were therefore clearly liable to the expenses which the call was intended to provide for.

Daniell and *Cole*, for the motion, contended that the general body of contributories were not liable until the members of the managing committee had refunded the deposit money improperly applied by them. They cited *Hunter's case*, 1 Sim. N. S. 435; s. c. 4 Eng. Rep. 164.

[SIR J. PARKER, V. C. Does it not make a difference, with regard to *Hunter's case*, that the parties have in this case executed the subscribers' contract?]

They referred to the 83rd and 103rd sections of the act of 1848, and contended that those sections gave a complete discretion to the Master to make calls on the general body, if the persons 'primarily liable failed to pay the debts and costs, but not otherwise; but he must have sufficient data on which to exercise that discretion; and here there were persons first liable who had not been called on to pay these costs. The managing committee here had no equity against the parties who had executed the subscribers' contract, because they had received ample funds to discharge all the liabilities which they had unlawfully applied to other purposes not warranted by their powers. They referred also to *Ex parte Preece*, 15 Jur. 528; s. c. 4 Eng. Rep. 161.

C. P. Cooper and *De Gez*, for some contributories.

Ex parte Gay.

SIR J. PARKER, V. C., without hearing the other side, delivered judgment as follows:—I do not think I can interfere with what the Master has done here. The first question is, whether the Master has power to do what he has done; and the facts as to that are these:—The Master has divided the contributories into two classes—those who have executed the subscription contract, and those who have not executed the subscription contract. Now, he has not made any subdivision of those who have executed the subscription contract. If anybody at all is liable—if there is any liability at all—it must belong to that class who have executed the subscription contract. And with regard to the case before Lord Cranworth, I do not think that that case will at all interfere with the view which the court takes now, because that was the case of a party who belonged to a class of contributories as to whom it was doubtful to what extent they were liable, if at all. It was the case of a company that had not gone so far as this. It was the case of a person agreeing to take shares which were allotted to him, and although he was on the list of contributories, it had not yet been ascertained what amount of liability that class had incurred at all; and Lord Cranworth says, “Surely it is one ingredient in the exercise of that discretion, that the Master should find that Mr. Hunter belongs to a class the whole of which is liable together to a call of some given amount, be it 5*l.* or be it 5000*l.* Surely the Master has not proper data on which to exercise his discretion until he has ascertained those facts.” It appears to me that he has got that datum here, because the class that is represented, upon this application to discharge the Master’s order, is the only class that can possibly be liable, and it is the class that has made itself liable distinctly by executing a deed of covenant to contribute towards the payments that have been made. Now, what are the costs that have been talked of here? They are costs that have been incurred for the common benefit—they are costs incurred in prosecuting an action and a suit, or at least in prosecuting a suit and defending an action, the object of the suit being to increase the assets, and the object of the action being to defend the assets, and therefore they must have been costs which have been incurred for the common benefit of all parties. Therefore it appears to me that this is as much a case in which the Master had power to act as the case of *Ex parte Preece* referred to before Vice-Chancellor Knight Bruce, where he thought the Master was right in making a call for costs in circumstances not very dissimilar to the circumstances of this case.

Then, if the Master has power, it is a case within his discretion; and the court cannot interfere with the discretion of the Master until it is satisfied that the Master has erred in the exercise of his discretion. Now, what the Master has done is not final; what he has done is merely provisionally making an order for the money to be brought forward. The proportions in which it is to be paid, with regard to those who may be primarily liable or secondarily liable is a thing that may be adjusted afterwards in the course of winding up this estate. And his honor the Vice-Chancellor Knight Bruce, in his

Ex parte Gay.

judgment when this case was before him, says, "There may be a case of necessity rendering that temporary injustice inevitable; the question still remains whether this is a case," and so on. What he means by "temporary injustice" is, that provisionally parties could be called upon to bring moneys forward, which moneys they have eventually to receive back from those persons liable to indemnify them. It has been urged before the court, that the Master has on this occasion acted not in accordance with the view taken by the court in the order of July last. As I understand it, when the Master made the call in July last, he made that call to pay, not costs only, but debts and costs; and in coming to that conclusion he does not appear to have had regard, or not to have had sufficient regard, to the circumstance that there was a question which, I am fully aware, will eventually be a most important question—that there is a certain class of these contributories who may be liable to bring forward a large sum in the way of accounting for money which they have already received; a portion of the assets of this company may hereafter be recovered, which will go in relief of the general body of contributories. It appears the Master either had no regard to that circumstance, or had not sufficient regard to it, and the court, under these circumstances, considered it right to discharge the former order of the Master. It is a thing particularly in the discretion of the Master what regard should be had to that, because he must not only have regard to the quantum to be recovered from these parties, but as to the time of getting it; because there may be a very clear liability on the part of these persons, which may not be capable of being enforced until it is too late get the money to meet the exigency for which the money is wanted.

It is said the Master is not justified upon the evidence in going against certain of the members. Suppose there are fourteen, and that seven can pay and seven cannot pay; it is said that the Master must first go against the fourteen, each for his own contribution; after he is satisfied, in the course of this proceeding, that seven cannot pay, he is to go against the seven that can pay, and so on *toties quoties*. But it would be a long time before the amount could be obtained for paying these costs by those means. Now, it appears to me that the circumstances now before the court differ in many most material points from the circumstances as they were before the court in July last. The court, of course, is bound by what it did in July last, and I do not consider I am in any degree going against the view taken of this case by the Vice-Chancellor Knight Bruce when it was before him. The matter has gone back to the Master; the Master has had regard, and has applied his discretion, to the circumstances which the court thought he had erred in not sufficiently regarding before; and having had regard to those circumstances, he now makes an order, which is something in the nature of a special report, by which he does not make this call now in respect of any debt—he puts the debts on one side, and makes it only in respect of costs. He says it is a matter of absolute necessity that these costs should be provided for; and it is obvious that must be so, because if the

Yates v. Madden.

company is attacked on one hand, and is to assert claims by means of litigation on the other, it cannot be done without the official manager being in possession of funds to enable him to do what is necessary. The Master says it is absolutely necessary there should be funds put into the hands of the official manager for that purpose; and the Master comes to that conclusion having had before him what he had not sufficient regard to before—the probabilities and possibilities of the claims against the managing committee. It appears to me, therefore, as far as I understand the case, that this call must be paid as a provisional payment to be adjusted afterwards; and that if, for the benefit of Mr. Cole's client and the rest of the body, it turns out that you can eventually make the managing committee liable, there will be a portion of the assets recovered, which may possibly go in relief of the other parties, and in relief of the party who makes this motion. Therefore, quite in accordance with the view taken by the Vice-Chancellor Knight Bruce, I do not think it right to interfere with the discretion which the Master has exercised upon all the new circumstances of the case brought before him. I do not think that I interfere with *Hunter's case*, or any other case, in coming to the conclusion that the Master has done what he had a power to do, and that he has exercised a sound discretion.

Costs of the official manager were given out of the estate, and no other costs were given.

YATES v. MADDEN.¹

January 21 and November 6, 1851.

Will—Annuity, whether Perpetual or for Life.

Bequest to Y. of "one clear annuity of 100*l.* per annum, for and during his natural life; and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother:"—

Held, reversing the decision of the late Vice-Chancellor of England, that the child of Y. did not take a perpetual annuity, but for life only.

Held, also, that the direction as to payment, "to be paid to his or her mother," did not cut down the annuity to the minority of the child.

THIS was an appeal from so much of a decree made on the hearing of the cause by the late Vice-Chancellor of England as declared that the plaintiff was entitled, under the will of Thomas Legal Yates, the testator in the cause, to a perpetual annuity of 100*l.*, Jamaica currency, (reported 13 Jur. 331.) The question in the cause arose upon a bequest in the will of the Hon. Thomas Legal Yates, of the island of Jamaica, who bequeathed an annuity to his son Edward in the following terms:—"I give, devise, and bequeathe unto my son,

Yates v. Madden.

Edward Crookson Yates, one clear annuity of 100*l.* per annum, for and during his natural life; and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother." And then he said, "I continue the charity which I have been allowing Mrs. Catherine Griffiths, &c., which annuity I direct to be paid and continued quarterly during her natural life." And after giving some specific legacies and some other annuities, he devised and bequeathed the residue of his estate, real and personal, or mixed, in trust to keep up his plantations; "in the next place, to pay, satisfy, and discharge the several legacies and annuities;" and then to pay and apply the residue of such personal estate, and all the real estate, and the rents, issues, and profits thereof, unto and among his wife and his other children (by name) equally, share and share alike, on the males attaining the age of twenty-one years, and the females attaining that age, or being married with their mother's consent, or the survivors or survivor of them, and to the issue of such of his last-named children as might die, having married with their mother's consent, such issue only taking the part or share his, her, or their parent or parents was or were entitled to take, *per stirpes*, and not *per capita*, to hold to them and their respective heirs as tenants in common, and not as joint tenants. Edward Crookson Yates survived the testator, and died in the year 1840, leaving his widow and one infant child, Emily Elizabeth Georgina Yates, him surviving.

Stuart, Hardy, and Speed, in support of the appeal, cited *Blewitt v. Roberts*, 10 Sim. 491; s. c. Cr. & Ph. 274; *Philips v. Chamberlaine*, 4 Ves. 50; *Robinson v. Hunt*, 4 Beav. 450; *Hedges v. Harpur*, 9 Beav. 479; *Innes v. Mitchell*, 6 Ves. 464; s. c. 9 Ves. 212; *Savery v. Dyer*, Dick. 162; and *Wilson v. Maddison*, 2 Y. & C. C. C. 372.

Roll and *E. F. Smith*, for the respondent, cited *Stokes v. Heron*, 2 Dru. & W. 89; s. c. 12 Cl. & Fin. 171, and Sir E. Sugden's comments on that case, at p. 236, in his Treatise on the Law of Real Property, as administered in the House of Lords; and *Byng v. Lord Strafford*, 5 Beav. 558.

Stuart, in reply.

The arguments are all fully noticed in the judgment.

November 6. The LORD CHANCELLOR, after stating the bequest, proceeded as follows:—The late Vice-Chancellor of England decided that Emily Elizabeth Georgina Yates, as the only child of Edward Crookson Yates him surviving, became entitled to a perpetual annuity of 100*l.* of Jamaica currency. Against this decision the defendants have appealed, praying that it may be declared that she is entitled to an annuity of 100*l.*, of Jamaica currency, during her minority only, or at most during her life. I am of opinion that she is entitled to an annuity of that amount during her life only.

Yates v. Madden.

In stating the grounds of this conclusion, I will first consider whether she can properly be held to be entitled to a perpetual annuity, according to the decision of the Vice-Chancellor. The remarks of Lord Cottenham will be found to be material, upon considering the improbability of a perpetual annuity being intended. Lord Cottenham, in *Blewitt v. Roberts*, Cr. & Ph. 274, remarks, "There is a marked distinction between the gift of the produce of a fund, without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptance of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee. In p. 282 he proceeds:—"If a testator were minded to give 10,000*l.*, can it be supposed that he would set about effecting this object by giving 500*l.* per annum to the intended legatee, without making any mention of the 10,000*l.*, or of any other capital sum? To carry into effect the gift of an annuity of 500*l.*, by raising 10,000*l.* out of the estate, would probably be very foreign from the testator's intention." And his lordship further remarks, at the same page, "To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A. is not inconsistent with holding that the gift of the produce of a fund, without limitation as to time, gives the fund itself. In the former case there is no allusion to any principal sum." In some cases, however, notwithstanding any antecedent improbability, annuities bequeathed indefinitely have been held to be perpetual. Thus, in *Stokes v. Heron*, Lord Plunkett, Sir Edward Sugden, and the House of Lords, all held, that by the terms of the will, when considered apart from a codicil, perpetual annuities were given. The testator there expresses himself in the following manner:—"My will is, that whatever I die possessed of, or in any way entitled to, together with any property my wife may be in any way entitled to, shall produce to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum for themselves and their children, and to my wife's mother, in addition to any property she may possess, so as to make up to her during her life an annuity of 100*l.* per annum, the said annuities, after the decease of my wife and her mother, to be equally divided among my three children: all the rest and residue of my property and possessions I give and bequeathe to my son William." So, in *Robinson v. Hunt*, 4 Beav. 450, a testator, after bequeathing an annuity to his nephew, proceeded as follows:—"And if my said nephew shall have any children, then the said annuity to be equally divided between them; but if only one child, then that child to receive the said annuity; but if my nephew should die without issue, then I desire that the said annuity of 100*l.*, to be paid as aforesaid, should go to my cousin, C. W., and to his heirs forever;" and it was held that the children took absolute interests in the perpetual annuity.

In *Stokes v. Heron*, Lord Cottenham alluded to two principles on which annuities given indefinitely have been held to be perpetual. The one is, that the gift of the produce of a fund, whether particular

Yates v. Madden.

or residuary, without limit as to time, is a gift of the fund itself. The other is, that where a testator speaks of an annuity, which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity. Whether the circumstances of *Stokes v. Heron* and *Robinson v. Hunt*, come within this principle, it is not necessary for me to express any opinion. The words used in those cases were not like the words used in the present case, and I conceive that the present case does not come within either of the principles above-mentioned. In *Stokes v. Heron* the whole fund was dedicated to the simple purpose of paying the annuities; but in the present case the testator does not give the produce of a particular or residuary fund—he merely gives the annuity, and then, in a subsequent part of his will, gives the residue on trust, among other things, to pay his annuities. Every annuity is payable out of some fund.

And as regards the application of the other principle alluded to by Lord Cottenham, the case of *Hedges v. Harpur*, 9 Beav. 279, shows that the words "same annuity" do not bring the present case within that principle; they mean no more than the same annual sum, or an annual sum of the same amount. It might seem, from some of the expressions used by Lord Cottenham in *Stokes v. Heron*, that if an annuity has duration beyond the life of the first taker, without any limit expressly assigned to that duration, no other period can be fixed for its duration short of perpetuity. This, however, would be contrary to his own decision in *Blewitt v. Roberts*, and to the decision in *Hedges v. Harpur*. In *Blewitt v. Roberts*, Cr. & Ph. 274, a testator gave to his wife 600*l.* per annum during her life, and after her death the said annuity to be equally divided between six persons and the survivors and survivor; and he also gave to each of those six persons 100*l.* per annum during their lives, with power to leave their respective annuities at their deaths to any persons they might marry, or any child or children they might leave; but in case of any of them dying without exercising such power, then to the survivor or survivors. The Vice-Chancellor held, that the bequest passed the capital of the fund producing the annuities; but Lord Cottenham, C., (whether rightly, I think, it may fairly be doubted,) reversed the decision, and held that life annuities only were given. In *Hedges v. Harpur* a testator gave to each of his five daughters 400*l.* per annum, to be paid half-yearly during their natural lives, and after their respective decease he gave the same to their children respectively, share and share alike; and in case any or either of his daughters should die without issue, then he directed such annuities to cease and fall into the residue; and it was held, that the children of each daughter became, each of them, entitled, for life only, to an equal share of the annuity bequeathed to their mothers. With regard to the words "I continue the same annuity," nothing can be argued from them, for a similar expression, "I continue the charity," occurs in the very next clause, by which only a life interest is given. The

Yates v. Madden.

word "continue" only imports prolongation of the annual payment, but for how long a time it does not at all determine. If it has any bearing on the question, I think it rather favors the construction contended for by the defendants. According to *Blewitt v. Roberts* and *Hedges v. Harpur*, Emily Yates would take no more than a life annuity; and there is also a decision of Sir William Grant, affirmed by Lord Eldon, in support of this view. I allude to the case of *Innes v. Mitchell*, 6 Ves. 464; s. c. 9 Ves. 212. In that case there was a gift to A of 200*l.* per annum, for the use of herself and her children, which annuity was to be paid out of the testator's general effects, until it should be convenient to his executors to invest 5000*l.* in the funds in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them lived; and it was held that a life annuity was given.

All these decisions are in accordance with the rule laid down by Lord Hardwicke, in *Savery v. Dyer*, 1 Amb. 139. Although, indeed, it was not necessary for him to do so for the purpose of the decision, he laid it down as a rule, that "if one gives to A by will an annuity not existing before," (that is, an annuity not existing at the date of the will, but created by the will,) "A shall have it only for life." It has been stated at the bar that the amount which would produce a perpetual annuity is about equal to the distributive share of the other children in the residue; and it was urged that it could not have been intended that the child of Edward should have only an annuity for life at most, while the other children of the testator and their issue are to have the corpus of their shares of the residue. But it is a fundamental rule, that the intention of the testator must be collected from the words of the will. Admitting, however, that I were at liberty to interpret the will conjecturally, the argument to which I have alluded would not be entitled to much weight; for so far from intending that Edward and his issue should be in the same position as the testator's other children and their issue, he has expressly created a great distinction between them by singling out Edward and his child or children as the objects of an annuity, and excluding them from a share in the residue, in which the other children participate. On the principle of antecedent improbability, adverted to by Lord Cottenham in *Blewitt v. Roberts*, the rule is, that an annuity given indefinitely is an annuity for life only, and an annuitant claiming a perpetual annuity in such a case must establish an exception in his favor. This the annuitant in the present case has, in my opinion, failed in doing.

On the authority, then, of the cases which I have mentioned, and on principle, I am of opinion that the annuity in this case is not perpetual, but is of no longer duration than for the life of the annuitant. The question now arises whether it is of less duration, — whether it is an annuity during minority only. It is urged that the words "to be paid to his or her mother" show an intention that the annuity should be only during the minority of Edward's child. But I think they do not show this with sufficient conclusiveness to curtail the duration of the annuity. We have seen, that, apart from the

Yates v. Madden.

words, "to be paid to his or her mother," a life annuity would be taken; and I think that those words no more curtail the duration of the annuity given by the preceding words, than the words "to be paid at twenty-one" prevent the vesting of a legacy bequeathed to A to be paid at twenty-one. In each case the words "to be paid" refer to the payment alone,—to the mode of payment in the one case, and to the time of payment in the other, and do not affect the gift itself. Besides, "to be paid to his or her mother" does not necessarily import that the annuity is to be paid to the mother during the minority only of the child: they may mean during the life of the child or the mother. To confine the payment to the mother, to the period of the child's minority, he must supply the words "during the minority of the child." And although I think, that as the direction as to the payment is indefinite, and some words must be supplied, it is more in accordance with the presumable intention that the words "during the minority of the child" should be supplied as a part of the direction as to the payment, and I accordingly supply those words in that place; yet, to make the direction as to the payment curtail the annuity, a further step is necessary; for when we have added the words "during the minority of the child," as a part of the direction as to payment, we must further ascribe to them the effect of cutting down the interest given by the preceding words; yet this operation they would not have by necessary or even plain or probable implication, for they might only amount to a direction that the annuity should be paid to the mother during the minority of the child, while at the same time the annuity was to continue after the termination of the minority, and for the rest of the child's life. Even supposing that there is any probability that an annuity during minority only was intended, arising from the words "to be paid to his or her mother," it is more than counterbalanced by the hardship that would result from such a construction, which repels the implication of such an intention. Presuming that the statement at the bar, that the money which would purchase a perpetual annuity is about equal to the distributive share of each of the other children, was correct, although I might in that case regret that I cannot affirm the decision of the Vice-Chancellor, yet if I were to do so I conceive that I should be conjecturally making a different bequest, rather than interpreting the bequest which I find in the will. The annuity, therefore, must be taken for life only; and during the minority of the child, the annuity must be paid to her mother.

Fyfe v. Swaby.

FYFE v. SWABY.¹

December 22, and 23, 1851.

Bill to restrain the Registration of Shares — Demurrer — Multifariousness — Injunction — 26th Section of Stat. 7 & 8 Vict. c. 110.

The directors of a provisionally-registered company purchased a lease of a mine, for 2000 shares, to be considered as paid up, from the defendant S., acting on behalf of himself and the plaintiff. The lease was assigned to trustees for the company, and 2000 free shares were allotted to S. in his own name. The company was completely registered, but S. never executed the deed of settlement, or registered as a shareholder in respect of these shares. S. had made advances on the shares for the plaintiff, and had brought an action for the same. A bill by the plaintiff against S. and the company, for specific performance and delivery of sealed certificates, and to have the accounts between S. and the plaintiff, in respect of the advances taken, and the action stayed, and also for an injunction to restrain any execution of the deed or registry as to these shares, was demurred to by the company for want of equity, and multifariousness: —

Held, that the company were bound to register and deliver sealed certificates to the plaintiff in respect of his 1000 shares; that the company were trustees for that purpose; and that the bill was not multifarious.

On motion for an injunction, it appeared that S. had refused to deliver to the plaintiff his shares, alleging fraud on the part of the plaintiff in the projection of the company, and that the mine was worthless, and that S. had exchanged the 2000 free shares for others.

Injunction granted (on payment of the balance of advances into court) to restrain S. from executing the deed of settlement, or registering the 2000 shares, and to restrain the company from allowing any such execution or registry.

THE bill was filed on the 17th November, 1851, against James Swaby and the Annotto Bay Mining Association, and stated that the plaintiff, being the equitable owner of a lease for 999 years in Thomasfield estate, in Jamaica, procured a lease to be executed by the legal owners to the defendant James Swaby, in order to facilitate arrangements for the projection of a company for working the mine: that on the 7th August, 1850, a company was provisionally registered, under the name of "The Annotto Bay Mining Association:" that by an agreement of the 13th August, 1850, the said James Swaby agreed to divide all profits and advantages that might result from the said lease with the plaintiff, in equal proportions, and to participate in like manner in any agreement that might be made with the company: that the plaintiff, on his return to Jamaica, gave the defendant Swaby a power of attorney to receive his shares, when allotted, and to sell them for him: that an agreement was entered into between the said James Swaby and the provisional directors of the company that the said mine should be assigned to the said provisional directors for the residue of the said term, upon trust for the company, and that in consideration thereof the said James Swaby should have allotted to him, on behalf of the plaintiff and the said James Swaby, 2000 shares of 1*l.* each in the said association, to be considered as fully paid up: that 2000 shares were accordingly allotted to Swaby in his own name, and scrip certificates corresponding thereto delivered to him: that an assignment of the lease was exe-

Fyfe v. Swaby.

cuted by Swaby to the provisional directors on the 13th September, 1850, and the said assignment and contract as to the said 2000 shares, and delivery thereof to the said James Swaby, were respectively made conditional on the completion of the said company, and to take effect after the certificate of complete registration thereof: that the company was completely registered on the 13th January, 1851: that an extraordinary general meeting of the association was held on the 27th March, 1851, for the purpose of adopting, or otherwise, the report and balance-sheet of the provisional directors, in which a detail of what had been done, and was in progress, in Jamaica, with respect to Thomasfield mine, was set forth: that such report and balance-sheet were received and adopted by the meeting: that Swaby never executed the deed of settlement, or registered himself or the plaintiff as shareholders in respect of the said 2000 shares: that Swaby, although he made advances to the plaintiff on account of the shares, and admitted the plaintiff's interest therein, in a correspondence set out in the bill, and had promised to pay the plaintiff a further sum of 1000*l.* on account thereof in March, 1851, ultimately refused to deliver any of the shares to the plaintiff, alleging sometimes that the mine was worthless, and that the shares would have to be given back to the company, and at other times that the plaintiff had made false representations of the quality and capabilities of the mine.

The bill charged that the company sought to repudiate the lease, on the ground that the assignment of the lease, and contract of the provisional directors, were not binding on the company, and that Swaby threatened to sue the plaintiff for his advances: and the bill prayed that the said Annotto Bay Mining Association might be decreed specifically to perform the said agreement for the allotment of the said 2000 free shares, in consideration of the said assignment of the said 13th September, 1850; and that it might be declared that the defendant James Swaby entered into the said last-mentioned agreement with the association on behalf of himself and the plaintiff jointly, or that the defendant James Swaby might be declared a trustee for the plaintiff in respect of one moiety of the said 2000 shares, under the memorandum of agreement of the 13th August, 1850: and that an account might be taken, under the direction of the court, of any advances to the plaintiff by the defendant James Swaby on account of the said 2000 shares; and that, on payment of the amount found due in respect thereof, (the plaintiff being willing and thereby offering to pay the same,) the defendant James Swaby might be decreed to deliver to the plaintiff the scrip certificates on a moiety of the said 2000 shares; and that the defendants might be decreed to make compensation to the plaintiff for the difference in value of any of the shares at the time when the same should be transferred to the plaintiff and the time within which the agreement ought to have been performed, the amount of such difference to be ascertained by the highest price which could have been obtained in the market for the shares during such time as aforesaid; and that the said amount due for compensation as aforesaid might be set off against such

Fyfe v. Swaby.

amount as might be found to be due by the plaintiff to the defendant James Swaby for advances as aforesaid; and that the Annotto Bay Mining Association might be decreed to deliver to the plaintiff 1000 sealed certificates, and register him as the shareholder thereof, (the plaintiff thereby offering to execute the deed of settlement, and to do all acts requisite to make himself a registered shareholder thereof in respect of the same,) or in case the defendant James Swaby should have lawfully sold the said 2000 free shares, then that the defendant James Swaby might be decreed to account to the plaintiff for the plaintiff's moiety of the proceeds arising from such sales, with such further sum as might have been received had they been sold at the highest marketable value they had reached; and that, in such case, the defendant James Swaby might be decreed to pay to the plaintiff what should be found due on the said last-mentioned account, deducting such amount as might be found to have been advanced by the defendant James Swaby to the plaintiff on account of the said shares; and that the defendant James Swaby might be restrained from executing the said deed of settlement, or registering himself as a shareholder in respect of the said 2000 shares, and from parting with, selling, transferring, or disposing of the same, or the scrip or other certificates in respect to the same; and that the Annotto Bay Mining Association, and the directors and other officers thereof, might be restrained from permitting such execution and registration by the defendant James Swaby, or by any other person or persons, in respect of the said 2000 shares, and from permitting any purchaser of the said 2000 shares to become registered shareholders, or to register transfers in respect of the said shares, and from delivering to the said defendant James Swaby, or any purchaser or purchasers, sealed or any certificates of the said shares; and that the said defendant might be decreed to pay unto the plaintiff the costs of his suit, or that the said costs might be paid out of the proceeds of sale of the interest of the said defendant James Swaby in the said 2000 free shares. A demurrer was filed by the Annotto Bay Mining Association for want of equity, and multifariousness.

Lloyd, for the mining association. There is no equity against the company. The bill is filed for specific performance, and the company have already performed the agreement by delivering scrip certificates, according to the plaintiff's power of attorney, to Swaby; they were not bound to do more; the evidence of title has been given, and the title follows from the scrip. This scrip is transferable, and whoever brings it is entitled to receive sealed certificates from the company. This is an answer to the prayer for scrip certificates and registration. As to all the other relief prayed, the bill is multifarious. The company have no interest whatever, whether Swaby is a trustee or agent of the plaintiff. The plaintiff seeks an account of advances by Swaby to the plaintiff on the shares, also compensation for any fall in the market value of shares, an account of sales of shares, if any, legally made, and an injunction against an action issued by Swaby against the plaintiff for these advances; but in respect of all these matters the company ought not to be made a party at all.

Eyre v. Swaby.

[SIR J. ROMILLY, M. R. It is the demurrer of the company alone, and as it assumes a case against Swaby, the question is, can that case be carried out without the company being before the court.]

The question is, whether, in order to establish a trust against Swaby, the company are necessary parties. The company do not raise the question of fraud, although Swaby refused to deliver the plaintiff's moiety of the 2000 free shares till the question of fraud about the mine should be cleared up; and the company do not dispute the original agreement, for they have adopted it by the resolution and otherwise. The question, whether the unregistered shares are transferable to purchasers, cannot be litigated in this bill, as the purchasers are not before the court.

Bovill, on the same side. *Jackson v. Cocker*, 4 Beav. 59, shows that the scrip certificates made the holder a shareholder, and that the company's agreement has been performed by delivery of the scrip. The bill is multifarious: the plaintiff must adjust his accounts with Swaby first, and then sue the company. Besides, there is no ear-mark or identity to the scrip; the bill does not allege them to have been numbered. The injunction sought is, in fact, an injunction against registering any shares at all by the company. Again: the plaintiff nowhere shows a balance in his favor; *non constat* he has any right to the shares. It is the same as a mortgage or pledge of the scrip, which may be sold to pay off the advance. If the injunction be granted, the mortgage or pledge will be worthless, as the power of sale will be gone. If the company are to be treated as mere stake-holders, the plaintiff must show that they have the shares; this does not appear.

Roundell Palmer and *Mackeson*, for the plaintiff, were not called on.

SIR J. ROMILLY, M. R. I am of opinion that the demurrer must be overruled. The objection for want of equity is not sustainable. The company agreed to purchase a mine for 2000 shares, which agreement ought to be, in my opinion, specifically performed. I perceive that the whole agreement is not sought to be enforced, and the bill and prayer may be open to many of the observations of the defendants' counsel; but the question on demurrer is, whether any case at all is made by the bill. It is observable, that no complaint seems to be made by the plaintiff against the company, who are only made parties in order to carry out the remedy which the plaintiff has against the other defendant, Mr. Swaby. The company has obtained the lease, and ought to deliver the 2000 shares, the consideration for it. If the company refuse to register these 2000 shares, they can be compelled to do so by this court; and though the company may have to wait whilst the rights of the plaintiff and Swaby are being litigated, yet the plaintiff is entitled to bring the company before the court, in order to secure the fund till the hearing. The title of the plaintiff under the agreement is admitted by the new as well as the old directors; and the plaintiff being entitled to sealed certificates, the com-

Fyfe v. Swaby.

pany cannot demur on that ground. The objection also for multifariousness cannot be sustained. It is urged that the company have nothing to do with the accounts of the plaintiff and Swaby, with the advances and sales in respect of the 2000 free shares, and with the action for such advances. But these accounts are merely matters which must be gone into and decided before it can be ascertained which party is entitled to the shares, and before the company can be called upon to deliver sealed certificates to either party. It is urged that no balance is stated to be due to the plaintiff; but the plaintiff is entitled to his share of the certificates on payment of what is due; and even if the balance due by the plaintiff were more than the value of the shares, still they are the property of the plaintiff, subject to the payment of that balance. The company, in fact, are trustees for the plaintiff after the accounts taken and balance paid. The demurrer must be overruled.

December 23. A motion was now made for an injunction in the terms prayed in the bill. Affidavits were filed substantiating the facts stated therein, and further stating that the 2000 free shares or scrip certificates, delivered to Swaby under the agreement, were all numbered 68; that Swaby had parted with some of them, and particularly that one Hook was, on the 29th November last, registered as a shareholder in respect of forty of them, although Swaby had never executed the deed of settlement, or been registered as a shareholder in respect of the same. The affidavit in answer of Swaby stated that the plaintiff had, on the projection of the company, made false representations of the richness of the mine, which was wholly unproductive, and had been since abandoned: that he, Swaby, had treated with the company solely on his own account for the 2000 free shares: that the object of his agreement with the plaintiff was not that the plaintiff should be the owner of, or have any control or power of disposition over, any of the said shares, but that he had always, with the concurrence of the plaintiff, determined to reserve to himself the entire ownership and disposition over them, allowing the plaintiff to participate only in any proceeds or advantages thereof: that the plaintiff was no party to the agreement with the provisional directors: that the 2000 free shares had been delivered to him, Swaby, on his own account, and that he had, before the month of November last, exchanged the whole of them for other scrip certificates in the same company. The affidavit of the solicitor of the company stated, that, in consequence of a disagreement between the provisional and the new directors, the offices and books of the said company were in great confusion, and that it could not be ascertained, from the papers in the possession or power of the present directors, whether the scrip certificates for the 2000 free shares in question were numbered 68; and that certain scrip certificates numbered 68, and representing 510 shares, had already been brought in and registered by other persons than the defendant Swaby.

Willcock, on the part of the defendant Swaby, offered an injunction

Fyfe v. Swaby.

as to 1000 other shares which were in Swaby's possession, and which he was willing should be considered as applicable to the demand of the plaintiff. But

Lloyd, for the company, not being willing to make any admission in the order to that effect, the offer was not acceded to.

R. Palmer and *Mackeson*, for the plaintiff. The plaintiff is entitled to his injunction upon his affidavits, which re-echo the statements in the bill, and no answer whatever has been given in the affidavits filed by the defendants; indeed, the affidavit of Swaby discloses a clear attempt to defraud the plaintiff of his shares. The only point which the company make is, that they cannot identify the 2000 free shares, and that the number of the shares is not stated in the bill. This, however, is quite immaterial: no number is required until the deed is executed, and the register of each share completed; and Swaby has never executed the deed or registered. But, in truth, the right to the shares rests in contract, and the scrip certificates talked of are mere writings which only evidence that right. The company are bound to perform this contract, by delivery of 2000 sealed certificates to the plaintiff and the defendant Swaby jointly, and to them alone. True, Swaby sets up that he exchanged the 2000 shares for others just before the bill was filed; but this is evidently collusive. Moreover, by the 26th section of the 7 & 8 Vict. c. 110, every disposal of shares by subscribers, before they have been duly registered as shareholders, is void; and the only persons to whom the company can deliver sealed certificates are the original allottees, who are bound to execute the deed, and register themselves as shareholders, before their rights, as such, can be perfected. It is, therefore, manifestly immaterial in whose possession the scrip certificates are, for the sole right rests with the plaintiff.

Willcock and *Dickinson*, for the defendant Swaby. The defendant Swaby, having passed away the shares, is liable to the persons to whom he has given them, and ought to be protected from such liability. The defendant Swaby charges the plaintiff with obtaining the shares under false and exaggerated representations of the value of the mine; and until the plaintiff has cleared up these charges of fraud, he is not entitled to any injunction. The complaints of the plaintiff in his letters are inconsistent with the case now made for him: in his letters he complains that Swaby did not sell, and he now says that all such sales are illegal. Besides, the thing is parted with, and therefore an injunction would be useless. The plaintiff may at the hearing be entitled to some sort of relief by way of specific performance, and yet not be entitled to an injunction in the interval.

Lloyd and *Bovill*, for the defendants the Annotto Bay Mining Association. The difficulty of granting an injunction arises from the indefinite nature of these shares. The company only ask that their duty may be so clearly pointed out that they may not be hampered

Fyfe v. Swaby.

in their proceedings. An injunction is asked to restrain the registry of any of these 2000 free shares, which are in the possession of third parties, strangers to the bill, and whose interests ought not to be prejudiced in their absence. The company are trustees, not only for the plaintiff, but also for all unregistered shareholders. It is said that all dealings with these shares before registry are void; but the section referred to (sect. 26,) does not appear so clear on this point; for if it be carried out to its full extent, it will cover every share, and the company's operations will be wholly impeded. The affidavit of Sutton shows the difficulty of identification, as 510 of the shares claimed by the plaintiff have been registered in the names of other individuals. Moreover, the charges of fraud and unproductiveness are relied on by the company as well as by Swaby; and the mine cannot be of value, when the plaintiff's affidavit says that it has been abandoned.

SIR J. ROMILLY, M. R. I am of opinion that the plaintiff is entitled to some injunction. The case is this:—The plaintiff, having become the equitable owner of a long lease of a certain property in Jamaica, makes a contract, through the instrumentality of Swaby, the defendant, with the Annotto Bay Mining Association, by which he and Swaby are to become free shareholders of 2000 paid-up shares of 1*l.*, in consideration of an assignment of the lease. This is carried into effect by the allotment of 2000 shares to Swaby, in his own name, on behalf of himself and the plaintiff. If the matter had stopped there, that state of the case not being at all disputed or denied, Swaby was a mere agent of the plaintiff for the purpose of receiving 1000 shares for him, and half of the 2000 so allotted are the actual property of the plaintiff; and I think the company are trustees for the plaintiff, for the purpose of making these shares available to him. One defence set up is, that the whole transaction was a fraud, that the property is worth nothing, and that on the faith of the plaintiff's representations of its value this company was established. I am not now hearing the cause, yet the defendant asks me to assume, in his favor, that it will ultimately turn out to be a fraud, and on that assumption to refuse protection to this property, the fruits of which, in case the plaintiff were afterwards to succeed, it will not be possible for the court to give him. I do not intend to give the plaintiff any order by which he can register himself as a shareholder of these shares: I am only preventing the defendant Swaby from dealing or parting with them.

Another defence set up, and a very singular defence, is, that he, Swaby, is bound in honor to the shareholders to repay them all their money if a case of fraud is made out, and that he cannot by possibility allow any of these shares to be parted with until it is decided whether the transaction was founded on fraud or not. Now, the answer to that is twofold. First, either the shares are valuable, or they are not; if valuable, the persons who purchased the shares will not be injured; if not valuable, the plaintiff will be taking a burden off the shoulders of Swaby. Secondly, the defendant Swaby says he is bound not to part with the shares, or allow them to be parted with,

Fyfe v. Swaby.

till he sees whether the whole transaction was founded on fraud or not. That is the very thing which the injunction will effect. The court, by granting the injunction, only assists the defendant Swaby in carrying out his own ideas of true morality, and preserving for all parties the shares to meet any contingency. At all events, this view of the case strongly shows that the protection of the court by injunction is necessary. I state no opinion as to what parties will be entitled to these shares ultimately, but I rest my judgment on the admitted relations existing between the plaintiff and defendant as originally established. I am of opinion that the plaintiff is entitled to have his property protected till a decree can be made by this court to decide whether he is entitled or not.

I have much greater difficulty with respect to the exact terms of the injunction, and I have considerable doubt whether any order I can pronounce will be as beneficial to the plaintiff as the order which was offered by arrangement, and which was refused by the plaintiff. In my opinion, he is entitled to have 1000 of the 2000 shares which were allotted to the defendant Swaby protected, so that they shall not be disposed of; but I have no means of ascertaining or determining which these shares are. The only persons who could afford me any information on the subject are the defendant Swaby and the company, and from them I have no information; therefore, I find myself bound to give the injunction in this form, because I have no other means of identifying them. It will be an injunction to restrain the defendant Swaby from registering in his own name, or allowing to be registered in the name of other persons, as far as he is able to prevent it—of course I mean merely as relates to his own acts—the 2000 free shares which were allotted by the company to the defendant Swaby as shares on which the amount had been paid up; and I must also grant an injunction against the company to restrain them from allowing any person to register their names as shareholders, or to execute the deed, in respect of these particular shares. Whether they will be able to identify them or not, it is impossible for me at present to ascertain. I have not the materials before me. If, by arrangement between the parties, which I should have thought would have been the best course to have been taken, they could have set apart 1000 shares to meet the question to be raised in this cause, that would have removed all difficulty on both sides. However, they have come to no arrangement of that description; there may be difficulties in the case which make it impossible for them to do so; respecting that I give no opinion; but respecting these 2,000 shares, which ought to have been identified, and which the company and the defendant Swaby ought to possess the means of identifying, and which, according to the experience the court has had in joint-stock companies, every company usually has the means of identifying, I can only make the injunction in the terms I have stated, leaving the parties to deal with it in the best manner they can, and leaving the matter open to these difficult questions hereafter, if any complaint should be made of a breach of this injunction. I can only grant the injunction on the payment into court of the 470*l*. for which the defendant Swaby claims

Osborn v. Morgan.

a lien on the shares. If that money is paid into court, I think that the defendant ought not then to prosecute the action against the plaintiff.

OSBORN v. MORGAN.¹

December 18, 1851, and January 13, 1852.

Wife's Equity to a Settlement — Reversionary Chose in Action.

A wife's equity to a settlement does not extend to include a reversionary interest in stock. The settlement of that fund cannot be asked for until it falls into possession, i. e. until the husband has a right (subject to this equity) to receive it.

UNDER the will of Julian Dibben, dated 1832, Ann Dibben, who was then unmarried, was entitled (besides certain other interests settled upon her and her children) to an immediate interest in a fourth part or share of the residuary personal estate, which ultimately was of the value of 422*l.* 8*s.* 5*d.*, and also (but subject to the life interest therein of one George Partington) to a fourth part or share of 1616*l.*, invested and set apart to satisfy an annuity of 50*l.* by the said will given to the said George Partington, and also of certain other property by the said will directed to be sold after the decease of the said George Partington, and in which a life interest was given to him. All these various sums still remained in the hands of the trustees. In 1837, Ann Dibben married the defendant Osborn, but no settlement, or agreement for a settlement, had ever been executed; and in 1846 the defendant Osborn became bankrupt. His assignees thereupon applied to the trustees for the payment of these moneys, or, at least, of the sum of 422*l.* 8*s.* 5*d.*; and to prevent this payment the present bill was filed by the wife, Ann Osborn, and the children of the marriage, against her husband and his assignees, and the trustees, alleging the circumstances as they have just been stated, and praying that it might be declared that Ann Osborn had a right to a settlement out of as well the 422*l.* 8*s.* 5*d.*, in which she took a present right under the will, as also in the said fourth parts or shares, in which she took only a reversionary interest.

Rolt and Rodwell, for the plaintiffs.

Bacon and Faber, for the defendants, the assignees in bankruptcy.

Nalder, for the husband.

Prior, for the trustees.

January 13, 1852. Sir G. TURNER, V. C., now delivered judg-

¹ 16 Jur. 52.

ment. The question which stood for judgment was, whether a married woman could compel trustees to make a settlement upon her out of a reversionary chose in action. No case has been found in which such a settlement has been decreed, and I am of opinion that such a settlement cannot be compelled. Marriage is a gift by the wife to the husband of all her personal property to which she is entitled, and of all to which she may become entitled at any time during the coverture, subject to his reducing it into possession. There is no difference whether the property be of a legal or equitable nature. The doctrine is founded on the circumstance, that husband and wife are considered as one person in law. The wife's equity to a settlement does not depend on any right of property in the wife; for, in the first place, the amount or proportion which shall be included in the settlement is always at the discretion of the court; and, in the next place, the wife cannot claim this equity for herself; she must claim it for herself and her children — two circumstances which are quite incompatible with the notion that this equity is based on any right, or supposed right, of property in the wife alone: it is only founded on the maxim, "that he who seeks equity must do equity;" and the husband, or those claiming under him, seeking to obtain the property, must submit to do so upon equitable terms. The right, therefore, does not attach on the property when this bill is filed, but when there is a right to receive the property. It is an obligation which the court does not fasten on the property, but on the right to receive it.

It then becomes important to remark, that if the right attach at all, it must attach with all its incidents; and one of these incidents is, that the wife may waive it. But her consent cannot be taken to waive her right to a reversionary chose in action not reduced into possession. She, therefore, has no right to claim a settlement of property of such a description. These considerations seem quite sufficient to justify the decision to which I have come. But authority is not wanting to confirm the view here taken. In *Woollands v. Crowcher*, 12 Ves. 174, Sir W. Grant says, (177,) "The wife's equity is, not to prevent her husband's receipt of the property, (for it belongs to him,) but to have a settlement; and the court requires her consent to the payment to him without a settlement. But in this instance the object is, not to bar her equity to have a settlement, but to bar her right to survivorship; for upon his death it belongs to her entirely. She is giving up, not her equity only, but her entire right by survivorship. That is not the case in which the court takes her consent." And Sir John Leach, in *Pickard v. Roberts*, 3 Mad. 385, says, "My opinion is, that a wife, by her consent in a court of equity, can only depart with that interest which is the creature of a court of equity — the right which she has in a court of equity to claim a provision, by way of settlement on herself and children, out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. The principle has no application to a remainder or reversion: when the remainder or reversion falls into possession, then the equity arises. If the wife, by

 Briggs v. The Earl of Oxford.

her consent, could pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent would make it analogous to a fine at law with respect to real estate—a principle always disclaimed in a court of equity.” I think, therefore, that I cannot accede to so much of the prayer of the bill as prays a declaration of the wife’s right to have a settlement of the reversionary interests. As to the rest, there will be a reference in the usual way.

 BRIGGS v. THE EARL OF OXFORD.¹

December 23, 1851.

Demurrer—Injunction to restrain Tenant for Life without Impeachment of Waste from cutting Timber, where Trustees had Power inconsistent with his Right, and to which it was expressly made subject.

In 1832 certain estates, of which A was tenant for life, with remainder to his son B in tail, and certain other estates to which A was entitled in fee simple, were settled, subject to certain charges, to trustees, upon trust to pay the rents (after paying the interest of mortgages) to A during the joint lives of himself and B, and if B died in A’s life, to pay an annuity to B’s wife, and, subject thereto, to pay such clear rents to A for life; but if A died in B’s life, then to stand seized of the estates to the use of B for life without impeachment of waste, (but subject to the power thereafter limited to the trustees or trustee thereof to fell timber and underwood growing on the said hereditaments,) with remainder, subject to an annuity to B’s wife, to his first and other sons in tail, with remainder to the heirs of A: and in the settlement was contained a power to the said trustees, or the survivor of them, at any time thereafter, so long as there should be any mortgage or incumbrance subsisting on the said hereditaments, (but not after A’s death, without the consent of B, to be signified in writing,) to cut all or any of the timber and underwood on the said estates, and to sell the same, and apply the proceeds in or towards the discharge of the subsisting mortgages or incumbrances, in manner therein mentioned. A died in B’s life. After A’s death the surviving trustees filed a bill against B and the other persons interested under A’s will, and otherwise in the estate, stating the above facts, and that a considerable quantity of timber had been cut down and sold for the purposes of the trust, and that the trustees, in exercise of their discretionary power, had entered into various contracts for sale to various persons of certain timber, &c., which had been cut and carried away, and that part of the purchase-moneys had been paid, but the remainder, though due, had not been received by the trustees, for the reasons after-mentioned; that B had claimed the right to cut timber, and had given notice that he would not consent to the trustees selling more, and had also given notice to the purchasers from them not to pay the purchase-money to the trustees, and that the plaintiffs were thereby prevented from receiving the purchase-moneys: and the bill prayed a declaration, that, by the construction of the settlement, the trustees had, during the existence of any mortgage or incumbrance on the said estates, a discretionary power, with the consent of B, to cut and sell all or any of the timber for the purpose of applying the proceeds in liquidation of such mortgages or incumbrances, and that the right of B was subordinate to their right; and for an injunction to restrain B from cutting or attempting to cut any such timber on the said estates, or from disposing thereof, so long as any such mortgage or incumbrance should be subsisting; and from receiving or attempting to receive, or applying to his own use, the proceeds of any timber already sold by him; and from doing, or attempting to do or continue, any act to prevent the plaintiffs from receiving any of the purchase-moneys payable under their said contracts, or any other proceeds of such timber.

¹ 16 Jur. 53.

Briggs v. The Earl of Oxford.

Upon demurrer to this bill, it was *held* that the allegations were sufficient to support the prayer for a declaration of the rights of the trustees, and to have the trusts executed by the court, if not for the injunction; and if that were an unnecessary part of the prayer, that would be a question of costs; and the demurrer was overruled.

Upon motion the injunction was granted, it being *held*, upon the construction of the settlement, that the scheme of it was, that the timber should be used to relieve the inheritance of the charges upon it, and that for this purpose the power given to the trustees was expressly made paramount to the privileges of the tenant for life without impeachment of waste to cut the timber, and that his consent was made necessary to enable him to regulate the mode of exercising the power.

THE late Earl of Oxford, being tenant for life, without impeachment of waste, of certain settled estates in the counties of Hereford, Radnor, and Brecon, chargeable with portions to his daughters to the amount of 30,000*l.*, and subject to existing incumbrances thereon; and being also seized in fee simple of certain other estates in the same counties, which last unsettled estates were likewise subject to certain mortgages, and to the debts of the Earl, an arrangement was made between the earl and his son, Lord Harley, (now Earl of Oxford,) then tenant in tail of the settled estates, to the effect, that Lord Harley should join with the earl in suffering a recovery of the settled estates, and that thereupon the settled and unsettled estates should be resettled, and made chargeable in the first instance, with the payment of the sum of 133,000*l.*, agreed to be raised and applied in full discharge of all charges and incumbrances or debts affecting the said estates, and, subject thereto, upon certain trusts agreed upon.

For the purpose of carrying the above arrangement into effect, an indenture of arrangement and resettlement, dated the 20th March, 1832, was made between the Earl of the first part, Lord Harley of the second part, John Moore, a trustee of the said estates, of the third part, and Thomas Briggs of the fourth part, and thereby certain trusts for carrying the above arrangement into effect were declared; and, subject thereto, the said estates were directed to be conveyed to and to the use of certain trustees therein named, and their heirs and assigns, upon trust, in the first instance, to raise certain sums of money, not exceeding in the whole the further sum of 50,000*l.*, to be applied as therein mentioned; and, subject to any mortgages which might be created for raising the same, the trustees were to stand seized or possessed of the said estates, upon trust to pay the clear rents and profits thereof (after paying the interest on the several mortgages which might be subsisting on the said estates, and an annuity to Lord Harley during his father's life, and the expenses of receiving the rents) to the late Earl of Oxford and his assigns during the joint lives of himself and Lord Harley; and in case of Lord Harley dying in the lifetime of his father, then, after his decease, to pay an annuity of 100*l.* per annum to Eliza Lady Harley, the wife of Lord Harley; and, subject thereto, to pay such clear rents and profits to the said Earl and his assigns during his life; but in case Lord Harley should survive the Earl, then, after the death of the said Earl, upon trust (subject as aforesaid) to stand seized or possessed of the said estates, to the use of, or upon trust for, the said Lord Harley

Briggs v. The Earl of Oxford.

and his assigns for and during the term of his natural life, *without impeachment of waste, but subject to the power thereafter limited to the trustees or trustee thereof to fell timber and underwood growing on the said hereditaments*; and from and after the death of Lord Harley, in case he should survive his father, then upon trust to pay an annuity of 600*l.* per annum to Lady Harley for her life, to be charged upon the estates; and after the decease of the Earl and Lord Harley, subject as aforesaid, upon trust for the first and other sons of Lord Harley, successively in tail male, with an ultimate remainder, in default of such issue, to the late Earl of Oxford, his heirs and assigns forever.

And the said indenture contained the following proviso:—"Provided also, and it is hereby further agreed and declared, that it shall and may be lawful for the said trustees, or the survivor of them, his executors or administrators, at any time or times hereafter, so long as there shall be any mortgage or mortgages, incumbrance or incumbrances, subsisting upon the said hereditaments, or any part or parts thereof, (but not after the said Earl's decease, without the consent of the said Alfred Lord Harley, if living, such consent to be signified in writing,) to fell and cut, or cause to be felled and cut, all or any of the timber and other trees and underwoods standing, growing, or being upon the said hereditaments, and to sell and dispose thereof, and to pay and apply the money to arise therefrom in or towards the liquidation or discharge of the subsisting mortgages or incumbrances, or of some or one of them; and in case the money to be produced by such sale or sales shall not at any one time amount to a sufficient sum or sums to be so applied, then the same, and the dividends and interest thereof, shall from time to time be laid out and invested by the said trustees, or the survivor, his executors or administrators, in the purchase of stock in some or one of the public funds, or upon government or real security, at interest, in their or his own names or name, to accumulate until the same shall amount to a sum sufficient to be applied in discharge or liquidation of the principal money which shall be due upon such mortgages or incumbrances, some or one of them, or such part thereof as the mortgagee or mortgagees, incumbrancer or incumbrancers, shall be willing to accept, and the same shall thereupon be applied accordingly."

And by the same indenture it was further provided, that in order the more readily to provide for the due payment of the interest of the several incumbrances which should for the time being be subsisting upon the said hereditaments, and of paying and applying the rents, issues, and profits thereof according to the several interests of the parties interested therein for the time being, they, the said Edward Earl of Oxford, Alfred Lord Harley, and John Moore, according to their several and respective rights, interests, powers, and authorities, did thereby nominate and appoint the said Thomas Briggs generally to superintend the management of the said estates, and to receive the rents of the said estates, and all moneys arising from the sale of timber and underwood on the said estates, and all other the issues and profits of the said estates, and to give receipts, releases, and dis-

Briggs v. The Earl of Oxford.

charges for the same, and to apply the same in manner therein more particularly mentioned. By a further indenture, dated the 12th November, 1835, and made between the said John Moore of the first part, the said Thomas Briggs of the second part, the said Earl of the third part, the said Lord Harley of the fourth part, and the Rev. John Bessell, Henry Winchester, Thomas Carter Briggs, and Thomas Briggs of the fifth part, the said estates, together with (*inter alia*) the trees, (as well timber as other trees,) woods, and underwoods, and the wood grounds, and the soil of the same, were, in pursuance of the direction to that effect contained in the said indenture of the 20th March, 1832, conveyed to and to the use of the last-mentioned parties of the fifth part, their heirs and assigns, upon the trusts, and to and for the ends, intents, and purposes, expressed and declared by the indenture of the 20th March, 1832.

The Rev. John Bessell and Henry Winchester, two of the trustees, afterwards died, leaving Thomas Briggs and Thomas Carter Briggs the sole surviving trustees of the said indenture. The late Earl of Oxford died on the 28th December, 1848, having first duly made and executed his last will and testament, together with a codicil thereto. By the will he gave and devised all his freehold manors, messuages, lands, tenements, tithes, and hereditaments, whatsoever and whosoever, in possession, reversion, or remainder, or which, by virtue of any special power, he was entitled to appoint by will, (subject to the charges, incumbrances, and prior estates to which the same might be subject,) to the use of the said Thomas Briggs and Thomas Carter Briggs, their executors, administrators, and assigns, for the term of 500 years from the time of his decease, without impeachment of waste, upon certain trusts; and, subject thereto, to the use of his eldest daughter, the Lady Jane Elizabeth Harley, (now Lady Langdale, the widow of Henry Lord Langdale, late Master of the Rolls,) for life, without impeachment of waste; remainder to the use of trustees to preserve contingent estates; remainder to the use of the first and other sons of his said daughter successively in tail male; and in default of such issue, to the use of his youngest daughter, the Lady Frances Harley, (now the Lady Frances Vernon Harcourt, the wife of Henry Vernon Harcourt, Esq.) for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of such daughter successively in tail male; and in default of such issue, he devised the said lands and hereditaments, upon certain trusts and to certain uses particularly mentioned in his will, in favor of his two other daughters, the Lady Charlotte Bacon, wife of General Bacon, and her issue, and the Lady Ann Harley, now the widow of Count St. Georgio. By the codicil to his will, the late Earl gave and devised the said lands and hereditaments devised by his said will (but subject to the charges and incumbrances referred to in his said will, and also to all the limitations and trusts declared and contained in his said will prior to the limitation to the use of his youngest daughter, the said Lady Frances Vernon Harcourt, for her life) to the use of the said Jane Frances Bickersteth, his granddaughter, during her life, without impeachment

Briggs v. The Earl of Oxford.

of waste, with remainder to the use of trustees to preserve the contingent estates thereafter limited; with remainder to the use of the first and every other son of the said Jane Frances Bickersteth, severally and successively, according to his respective seniority, in tail male; and in default of such issue, then to the same uses and upon the same trusts, in favor and for the benefit of the testator's youngest daughter, Lady Frances Harcourt, and her issue male, as in his said will expressed and declared of and concerning the same; and, subject thereto, to the use of his said eldest daughter, Jane Elizabeth Lady Langdale, her heirs and assigns forever.

The present Earl of Oxford (late Lord Harley) had no issue of his marriage. A sum of 140,000*l.* was raised under the trusts of the indenture of the 20th March, 1832, by mortgage to the Equitable Assurance Society; and during the lifetime of the late Earl, the trustees, under the power contained in the deed of resettlement hereinbefore set forth, cut a large quantity of timber, and applied the produce thereof in reduction of the mortgage; by which means, together with the moneys received from the produce of the sales of land under contract at the time of the execution of the indenture of the 20th March, 1832, the mortgage debt upon the estates was reduced to the sum of 93,000*l.*

The present bill was filed by the two surviving trustees of the said settlement against the present Earl of Oxford and other parties interested in the said estates, stating the above facts, and that since the decease of the late Earl, the surviving trustees, in pursuance of their discretionary power, and with the consent in writing of the present Earl, had entered into various contracts for the sale to various persons of certain timber, &c., which had been cut and carried away pursuant to such contracts; and that part of the purchase-moneys payable under such contracts, but only to a small amount in the whole, had been received by the plaintiffs as such trustees, and had been, or was about to be, applied by them pursuant to the aforesaid trusts; but the remainder of such purchase-moneys, though due to the plaintiffs, had not yet been received by them, for the reasons hereinafter mentioned: that the present Earl claimed the right to sell the timber, and apply the proceeds to his own use; and in consequence he gave notice to the trustees that he did not intend to consent to any further sale by them of timber, &c., under the said power; and he also gave notice to the parties who had purchased timber, &c., from the trustees, under said contracts, not to pay their purchase-moneys to the trustees: and that the plaintiffs, by reason of such proceedings of the defendant, the said Earl of Oxford, were prevented from receiving the purchase-moneys due to them for timber already sold; and that the said Earl threatened and intended to fell and cut and sell some of the timber, and had actually entered into contracts with various persons for the sale of the timber, and that he threatened and intended to receive the purchase-moneys under the said contracts, or otherwise produced by the sale of the timber so intended to be cut by him, and to apply the same to his own use.

And the said bill charged that the said Earl, as the plaintiffs had

Briggs v. The Earl of Oxford.

recently discovered, had actually cut down and sold some timber, and received the proceeds, and applied them to his own use; and it prayed that it might be declared, that, by the true construction of the said indentures of the 20th March, 1832, and the 12th November, 1835, the plaintiffs, as such trustees, had, during the existence of any mortgage or incumbrance subsisting at the date of such indentures, or subsequently created under the trusts of such indentures, on the said trust estates, or any part thereof, a discretionary power, with the consent in writing of the said Earl of Oxford, during his life, to fell and cut and sell all or any of the timber and other trees and underwoods standing, growing, or being upon the said trust estates, for the purpose of applying the moneys to arise therefrom in or towards liquidation of such mortgages or incumbrances, or some or one of them; and that it might also be declared that the right of the said Earl of Oxford, as the equitable tenant for life of the said trust estates under the limitations of the said indenture, was subordinate to the right of the plaintiffs to exercise such discretionary power; and for an account of the proceeds of all timber cut and sold by the Earl of Oxford, received by or for him, and that he might be decreed to pay what he should appear to have received, with interest, to the plaintiffs, to be by them applied upon the trusts to which the proceeds of timber cut under the said discretionary power were applicable, or that such amount might be a charge upon his life estate, and be raised out of it accordingly; and that the said Earl might be restrained by injunction from felling or cutting, or attempting to fell or cut, any such timber or other trees or underwoods growing, standing, or being upon the said trust estates, or any part or parts thereof, or disposing or attempting to dispose thereof, so long as any such mortgages or incumbrances, mortgage or incumbrance, as aforesaid, should be subsisting upon the said trust estates and hereditaments, or any part or parts thereof; and from receiving or attempting to receive, or applying to his own use, the proceeds of any such timber, other trees, or underwood theretofore sold by him or by his authority, or any part of such proceeds; and from doing or continuing, or attempting to do or continue, any act or thing whereby the plaintiffs should be prevented or hindered from receiving, for the purposes aforesaid, any of the purchase-moneys payable under the contracts so entered into by them with the consent of the said Earl as aforesaid, or any other proceeds of any such timber or other trees or underwoods as aforesaid. To this bill a general demurrer was filed.

Bacon, for the demurrer, said that the general allegations contained in this bill with respect to the exercise of their power by the trustees, and the contracts by them for the sale of timber, and the interference of Lord Oxford with their right, were much too vague to entitle them to any relief in equity. There was no statement to whom the timber had been sold, or when it was sold. Then this was, according to the statement, a mere sale and delivery of goods, for which part of the money was paid, and part remained to be paid; and as to the money due, Lord Oxford was in the position of a stranger who had given

Briggs v. The Earl of Oxford.

notice to the purchaser not to pay it to the plaintiffs. How could that give the plaintiffs any equity? They were not prevented by such notice from recovering the money in an action for goods sold and delivered. They needed no protection in equity by injunction. Such allegations did not give them any title to relief, and their vagueness was an objection which alone would be a good ground of demurrer. *Wormald v. De Lisle*, 3 Beav. 18.

The Solicitor-General, for the plaintiffs, said that the bill did not ask an injunction only, but also a declaration that the trustees were entitled to apply the proceeds of the timber under the trusts of the deed.

Sir J. PARKER, V. C., interrupting the argument, said that, saying nothing as to the merits of the case, he considered that merely on technical grounds the allegations in the bill were sufficient to support part of the prayer. It was stated that the trustees, in the exercise of their discretion, had entered into a contract to sell, and had cut down and carried away, timber. Lord Oxford, being equitable tenant for life, having an interest in the execution of the trust, not being a mere stranger, had interposed by a notice that prevented them from receiving the moneys. The bill distinctly stated that Lord Oxford had prevented them. The trustees came here, in execution of the trusts, as between Lord Oxford and all other parties, to have it declared that they were entitled to receive and pay these moneys, and to restrain Lord Oxford from attempting to continue the acts complained of. His honor said that might possibly be an idle and unnecessary prayer. The trustees might have been under an unnecessary apprehension. With that the court could deal in considering the question of costs; but his honor thought there was enough in the charge, as to the execution of the trust, to entitle them to make the application that the trusts of the deed might be executed under the direction of the court, as far as regarded the money still remaining to be paid; and, therefore, that the demurrer was too large, and it must be overruled, reserving the costs.

The Solicitor-General, J. Russell, and Toller then proceeded to open the motion for an injunction in the terms of the prayer. The case turns entirely on the construction of the deed. The primary object of the settlement is to pay off the incumbrances, and for that purpose the trustees have the fullest discretion. Lord Oxford takes the privilege which being made unimpeachable of waste gives him, expressly subject to the power given to the trustees to cut timber. The trustees do not assert a right to cut timber, without the consent of Lord Oxford. If that consent is withheld, they contend that, at any rate, he has no right to cut timber for his own benefit. If he had, that would give him a direct interest to withhold his consent. It would be a fraud upon the settlement to withhold consent, not for the benefit of the sons, but to prevent the exercise of the power to which his privilege is subject, for his own benefit. The privilege of being unimpeachable

Briggs v. The Earl of Oxford.

of waste gives Lord Oxford the right to deal with the estate in various modes; besides cutting the timber, he may quarry stone, open mines, &c.; so that this limitation of his privilege is not inconsistent with his exercise of it to some extent. The paramount object of this settlement is to provide for certain creditors, and this could only have been effectually done by making Lord Oxford's privilege subordinate to the power of the trustees to raise certain sums. Lord Oxford may find some means of paying off the incumbrances, in which case he could exercise his privilege to its full extent. The courts have interfered with legal powers, as in the case of equitable waste. *Burges v. Lamb*, 16 Ves. 174; *Kekewich v. Marker*, 3 Mac. & G. 311; s. c. 5 Eng. Rep. 129. The necessity of Lord Oxford's consent is introduced only to prevent an improper exercise of the power. *Hewitt v. Hewitt*, 2 Eden, 332.

Bacon, Malins, and Cole, contra. The present Lord Oxford was just of age when this settlement was executed by him. Can it be supposed that he was made to pledge his inheritance, without any benefit to himself, for debts to which neither himself nor his estate were before liable? Yet this is the construction the plaintiffs put upon this deed. If it was meant that he should in fact be impeachable of waste, why was not that specified? The trustees have cut a large quantity of timber already, of very great value, and it surely is time that Lord Oxford should have some benefit from his being made unimpeachable of waste.

Sir JAMES PARKER, V. C., (without hearing the reply.) This is purely a question of construction, as I view it. I have not been impressed with the notion that there is any question of equity in this case, independent of the question of the construction of the deed. Now, here is a large estate in strict settlement. I do not think the marriage settlement is very material; it so happens that the legal estate is in the trustees. The late Earl of Oxford was tenant for life; the present Earl is tenant for life in remainder, in trust for his first and other sons in tail, with remainder to Lord Oxford in fee. The estate was subject to heavy charges; and with reference to those, the deed contains the provisions, which have been so much referred to, with respect to the timber which grows upon the estate, and those provisions provide for the application of the timber for the benefit of the inheritance, the object being to relieve the estate of the charges; and those provisions, beyond all doubt, give the parties who are interested in the inheritance an interest in the timber. The scheme of the settlement is, that the timber shall be applicable by the trustees under the power which has been so much referred to, for the purpose of relieving the estate of the charges, and the mode of doing this is by means of a power given to the trustees. Now, this power continuing in existence, and to be exercised at the proper time, appears to me to be an essential part of the settlement. The remainder-man has a right to whatsoever benefit that power gives him, and the question in this suit is, as to the equities between the tenant for life and the parties entitled in remainder

Briggs v. The Earl of Oxford.

The question arises upon the limitations, which are these : — There is, first, the life estate of the late Lord Oxford, which confers no privileges upon him in respect of waste ; and then the second life estate of the present Lord, which is without impeachment of waste. Now, no doubt those words, taken alone, give privileges incident to the estate with which we are all well acquainted. There is no doubt all those are privileges capable of qualification, capable of being qualified at law, and, still more, qualified by way of trust in this court. Now, there are these words attached to the words “without impeachment of waste,” viz. the words “subject to the power hereinafter limited,” and so on. Suppose those words had not been there, we should then have had an estate without impeachment of waste, and we should have had a special provision in the deed with respect to the application of the timber, and that would have given rise to a question very similar to that which arose in *Kekewich v. Marker*; and no doubt there would have been a question of much more doubt than arises here. The question would have been, whether, when you find special provisions in respect of timber, those special provisions should or should not control the more general provision. There would have been great force in the argument, that even without any words here, there would have been quite enough for the privileges to operate upon, irrespective of the timber : the tenant for life might have had a right to open mines, and be exempt from any liability in respect of the repairs of the houses and buildings, and be at liberty to manage the property as he thought fit, and so on — none of which things the tenant for life, unless he had those privileges, could have had a right to do.

But really here it is not a matter of speculation, because we find it expressly said, “subject to the power hereinafter limited to the trustees or trustee, under these presents, to fell timber and underwood growing upon the said hereditaments;” and that carries us to the power of the trustees, which is a power in the trustees at any time afterwards, but not after the death of the Earl, without the consent, in writing, of the present Lord Oxford, to fell and cut down timber, and so forth ; and the real question is, to what extent the words I have read, or rather the words contained in the power, because the only thing that gives rise to any doubt are the words “without consent” — to what extent those words qualify the general privileges given to the present tenant for life, as being without impeachment of waste ; and that comes to be a question of construction upon those two clauses. Now, with respect to the power upon which the main argument turns, two constructions are contended for. One is, that when you read these words, that the power is not to be exercised without the consent of the present Lord Oxford, leaving such consent to be signified in writing, the power does not exist until that consent is given, and you are really to read the deed, till that consent is given, as if no such power were found in the deed. That is mainly the argument urged by the defendant.

On the other hand, the plaintiff's view of the case is, that that consent has reference to the mode of exercising the power, and that

Briggs v. The Earl of Oxford.

Lord Oxford, being tenant for life in possession, has a reasonable qualification on the power of the trustees, that when they come to exercise a power which would interfere materially with the mode in which he thinks fit to enjoy his estate, he shall have a voice in the exercise of that power, and that the power shall not be exercised without his consent in writing; and I think the latter is the true construction. And what appears to me, among other things, to point out clearly that that must be the construction, is this. It is admitted that the timber is all at the mercy of the trustees during the lifetime of the first tenant for life. That is admitted. Now, it is reasonable, if the intention of the settlement was to preserve or protect the timber for the present tenant for life, so that he should have a valuable interest in it—it is reasonable to suppose that this qualification upon the power of the trustees, that they should not cut without his consent, should be extended to the life estate of the present tenant for life. It is limited only to the life estate of the present tenant for life; and that really seems to me to show that the object was, not to put an end to the power, but to regulate the mode of exercising the power for the benefit of the present tenant for life. Now, no doubt, the want of consent, according to the view I take of this, in the present tenant for life, suspends the power; it does not destroy it, or prevent its being in existence, but it cannot be exercised until he gives his consent; and if he does not give his consent, the timber remains, according to the view I take of it; and if he withhold his consent during his life, then the timber is, after his death, either to be cut down by the trustees in the exercise of the power, or to belong to the tenant in tail, who is entitled to the inheritance of the estate and to the timber, and with respect to whom it might by possibility be immaterial whether the trustees exercised their power or not.

It is a sound rule of construction in this court so to construe clauses in a deed as that one shall not be repugnant to another, if that be possible. Now, it does appear to me that the construction of the defendant makes these clauses repugnant one to the other. In order to test that, it is only necessary to suppose that, in the limitation of the life estate, you read the power as part of it; and I think that would show—supposing the limitation of the life estate had been to him without impeachment of waste, but subject to the power following—that is to say, that it shall be lawful, at any time or times hereafter, for the trustees, but not without the consent of the tenant for life, to cut timber—it seems to me that there would be an obvious incongruity to suppose he was to be subject to a thing that was not to be done without his consent. But, on the other side, there is really no inconsistency in the other view to read in this way, that the powers incident to the life estate are not to be exercised by Lord Oxford in a manner inconsistent with the power which is given to the trustees. That is the view I take of the construction of the deed; therefore I think you are entitled to whatever injunction is incident to that construction of the deed, namely, that it is a part of the deed, which was stipulated for on the part of the parties entitled in remainder, that the timber should remain there to answer the power when

Thistlethwayte v. Garnier.

the proper time comes for the trustees exercising it. This decides nothing, except that the timber is to remain until the right is properly adjudged. The injunction must be granted.

Bacon. Some timber is cut, and paid for by bills.

SIR J. PARKER, V. C. The court does not interfere with the acceptance of those bills, but no more must be discounted.

THISTLETHWAYTE v. GARNIER.¹

November 20, 1851.

Practice — Setting down amended special Case.

After a special case had been set down for hearing, and before it came on to be heard, a tenant in tail of the property to which the case related was born, who was a necessary party to the case. On motion *ex parte*, an order was made to discharge the order to set down the original case, and to set it down again amended, by adding the infant tenant in tail as a party, and that it should keep its place in the paper, fresh appearances being entered for all the defendants.

Freeling moved *ex parte* for leave to set down a special case under Sir George Turner's Act, 13 & 14 Vict. c. 35, in the following rather peculiar circumstances:—The case had been already set down, and all proper persons were parties to it. Since it was so set down, a new tenant in tail of the property to which the case related had come into existence. Some of the parties to the original case were married women. The present application was for leave to amend the case by the addition of the tenant in tail as a party, and to set down the case as against the infant tenant in tail, and also against the parties to the original case, and that the case might keep its place in the paper, notwithstanding such alteration. He cited sect. 32 of the above act, making the rules, orders, and practice of the court in suits applicable to proceedings under that act, and said that the proper course would be to file a supplemental case; but here such supplemental case would be a fac simile of the original case, which was very long, with only the addition of this short supplemental statement. He referred to sect. 13, which gives the court a certain discretion in setting down a case to which a married woman, infant, or lunatic is a party, and provides that special leave shall be necessary to set down such a case. There was nothing said in that section about setting down again a case already once set down.

SIR J. PARKER, V. C., said that the regular course would be, to discharge the order for setting down the original case, and to give leave

¹ 16 Jur. 57; 21 Law J. Rep. (N. S.) Chanc. 16.

Neate v. Pink; Ex parte Fletcher and Yates.

to set down the amended case, and to let it keep its place in the original paper. His honor said that fresh appearances ought to be entered for all the defendants. If that were done, he would grant the application.

NEATE v. PINK; *Ex parte* FLETCHER AND YATES.

November 4, 5, 6, 7, and 8, 1850, and November 4, 1851.

Liability of Trust Property—Right to begin.

A testator appointed an executor, with power to manage, conduct, carry on, and improve his estate. The property consisted of a moiety of an estate in Jamaica. The trustee took a lease of the other moiety, and managed the whole for the trust estate:—

Held, that although the taking of this lease was not authorized by the will, yet that, under the circumstances of this case, the acquiescence of the *cestui que trust*, and otherwise, the trust estate was liable for arrears of rent and dilapidations.

Where there are two petitions appealing from an order, one to the effect that no relief ought to have been granted, and the other that a greater measure of relief ought to have been granted, it is more convenient that the petition asking the relief should be opened first.

THE facts of this case are fully stated in the Lord Chancellor's judgment.

Upon the opening of this case a question arose as to who should commence. There were two petitions of appeal: one, the petition of the original petitioners, who appealed from the order below on the ground that they did not get all the relief that they were entitled to; and the other was the petition of the plaintiffs in the suit, who appealed on the ground that the original petitioners were not entitled to any relief.

The LORD CHANCELLOR thought that it would be more convenient that the counsel for the original petitioners, who asked for relief, should commence, rather than the counsel for the petitioners who denied the right to relief.

Stuart, J. Parker, Rolt, Teed, Malins, J. Bailey, Piggott, Hardy, Terrell, Hallett, and Eddis were the counsel in the case.

Authorities cited:—*Scott v. Nesbitt*, 14 Ves. 438; *Worrall v. Harford*, 8 Ves. 4; *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 1 Buck, 202; and 2 Wms. Exors. 1525-7, 4th ed.

November 4. LORD CHANCELLOR. This is an appeal against an order made by the late Vice-Chancellor of England, on the petition

Neate v. Pink; Ex parte Fletcher and Yates.

of the present appellants. The facts of the case are as follows:— John Hiatt, the testator mentioned in the pleadings, was, at the time of making his will, as well as at the time of his decease, seized of one undivided moiety of an estate in Jamaica, called “the Fellowship Hall estate,” and the slaves, stock, and plantation utensils, and implements thereon, and of other estates in the same island; and the appellants were seized, and are still seized, of the other undivided moiety, called “the Byndloss” moiety. John Hiatt appointed John Pink executor and trustee of his will, with power to manage, conduct, carry on, and improve his residuary estate, to the best advantage. From the death of John Hiatt down to the commencement of the lease, which I shall presently mention, the estate was worked by John Pink, as representing Hiatt’s moiety, jointly with Philip Jacquet, the person employed on behalf of the appellants, as the owners of the Byndloss moiety. But dissatisfaction having been expressed by them at the small amount of produce derived from their moiety, John Pink, in a letter to Jacquet, dated the 11th November, 1828, proposed to take a lease of that moiety for the benefit of the claimants under the will of John Hiatt; and by an indenture, dated the 4th June, 1830, John Pink took a lease of the Byndloss moiety for three years, from the 1st January, 1830, at the rent of 600*l.*, and thereby covenanted to keep the demised property in the same cultivation, order, repair, state, and condition. The lease so taken was not, on the face of it, granted to John Pink as trustee of the will of John Hiatt, and, indeed, it contains no reference whatever to the trusts of that will, but, on the face of it, it appears as if it were granted to him in his individual capacity; but it clearly appears that it was, in reality, taken by him in his character of trustee of the will of John Hiatt. Before the expiration of that lease, John Pink proposed to take a new lease for a further term of three years, from the 31st December, 1832, at the rent of 400*l.*, such new lease to be an exact copy of the old lease, with the alteration of the date and the difference of rent. No lease was executed, but the appellants accepted the terms contained in this letter, and John Pink continued, as such trustee, to hold the Byndloss moiety. John Pink died in September, 1833, and thereupon the trusts of the will of John Hiatt devolved on Edmund Pink, as the heir at law of John Pink, but Edmund Pink never acted as such trustee, and Williams and Mackenzie, the executors of John Pink, entered into possession of the trust estate of John Hiatt, and of the Byndloss moiety of the Fellowship Hall estate, and they and their consignees, Davidson and Barkley, always treated that moiety as part of the trust estate of John Hiatt.

In April, 1834, the parties interested under the will of John Hiatt filed a bill in this court against the executors of John Pink, praying that the plaintiffs might be let into possession and management of the estate of John Hiatt, and for the appointment of new trustees, and of a manager in Jamaica, and of a receiver and consignee in this country. On the 15th February, 1835, in pursuance of an order dated the 9th December, 1834, Patey, Sewell, & Marshall, were appointed managers and receivers in Jamaica of the trust estate and premises of

Neate v. Pink; Ex parte Fletcher and Yates.

John Hiatt, and J. H. Palmer was appointed consignee and receiver in this country. In pursuance of the suit in this court, and in order to enable the receivers to obtain possession of the trust estate, a suit was instituted in the Court of Chancery in Jamaica, in April, 1835, by the plaintiffs in the suit in this court, against the defendants to the same suit; and by an order on a petition in the suit so instituted in Jamaica, it was ordered that the mercantile house of Patey, Sewell, & Co., and R. H. N. Heming, should be appointed joint receivers and managers of the trust estate and premises of John Hiatt, and that Williams and Mackenzie should deliver up possession of the trust estate and premises to the said receivers, and that the receivers should be at liberty to ship the produce to J. H. Palmer, or sell it, and account for it to him. In pursuance of this order, the executors delivered up to the receivers possession of the trust estate of John Hiatt, and of the Byndloss moiety, with the privity of the solicitors of the plaintiffs in the suit in this court, and the receivers always treated that moiety as held by them for the benefit of the trust estate of John Hiatt; and in all the reports in the Jamaica suit of the transactions of the receivers, in relation to the Fellowship Hall estate, (which reports were not made up, filed, or confirmed until all the parties there had been served with the usual notices, giving them ample time to make objections thereto,) the following statement is contained as to the Fellowship Hall estate—"one moiety being the property of the trust estate of John Hiatt, and the other moiety held by the said receivers for the said trust estate at an annual rent of 400*l*."

Towards the close of the year 1837, an agreement was come to between the receivers and the attorneys of the appellants, that the receivers should continue to pay the rent of 400*l* a year, in respect of the Byndloss moiety, from June, 1835, until either the terms of a new lease should be agreed on, or the appellants should resume possession, subject to certain deductions, not necessary to be here stated. No rent has been paid for the Byndloss moiety since June, 1835. In September, 1838, the appellants commenced an action in Jamaica against the receivers for the recovery of the rent then due, and obtained a verdict, and judgment was entered up in the action. But such proceedings being considered to be a contempt of the Court of Chancery, execution was not taken out; but two applications were made to the Court of Chancery in Jamaica, by the appellants in the suit instituted there, for payment of rent, and to be let into possession of their moiety; and by an order of the Court of Chancery there, in January, 1842, it was ordered that the appellants might enter into possession, and that rent at the rate of 400*l* per annum should be paid from the 1st June, 1835, to the 31st December, 1839, (subject to a certain proviso); and that a proper compensation, to be ascertained by the Master, should be paid for the use and occupation of the Byndloss moiety since the 31st December, 1839.

Owing to the neglect and mismanagement of the receivers in Jamaica, the Fellowship Hall Estate, at the date of the Master's report, which I shall presently mention, was in a state of utter ruin, although at the date of the lease it was in excellent condition, but

Neate v. Pink; Ex parte Fletcher and Yates.

the amount of the dilapidations has not been ascertained. The appellants were let into possession in June, 1842. But the rent from June, 1835, is still due, and there appears to be no fund standing to the credit of the Jamaica suit; and the Master has certified his opinion to be, that it is impracticable for the appellants to recover in Jamaica any part of the amount due to them in respect of their moiety of the Fellowship Hall estate. There are now standing to the credit of the cause in this court two sums, arising from the produce of the Fellowship Hall estate, and from compensation-money in respect of slaves on the estate of John Hiatt. In June, 1845, the appellants presented their petition to this court, praying that a certain agreement for a compromise might be carried into effect, or for an inquiry as to what was due to them in respect of the matters aforesaid from the estate of John Hiatt, and that the amount thereof might be paid to them out of the fund standing to the credit of the cause; and thereupon an order was made for a reference to inquire whether any and what sum paid into the bank to the credit of this cause, by J. H. Palmer, had been paid in respect of the produce and profits derived since the 1st June, 1835, from the Byndloss moiety of the Fellowship Hall estate. On the 13th July, 1849, the Master made his report, to which I have already alluded, whereby he certified to the effect of what I have stated, and that 2800*l.* was due to the appellants, with interest at 6*l.* per cent., for rent, without including any thing for dilapidations, the amount of which was not ascertained by him. No exceptions have been taken to this report. In July, 1849, the appellants presented another petition in this cause, praying for payment of the sum so found due; and that the sum of 2600*l.*, claimed by them for dilapidations, might also be paid, or that it might be referred to the Master to inquire what ought to be allowed in respect of such dilapidations; and by an order made thereon, the said sum of 2800*l.* was ordered to be paid, with interest thereon at the rate of 4*l.* per cent. from the 1st December, 1846.

The petitioners have appealed from the order made on their petition, on the ground that the same does not provide for or extend to the whole of the relief prayed by their petition; while the respondents contend that the order in question goes too far. It being perfectly clear, from what the Master has found, that the Byndloss moiety of the Fellowship Hall estate has, from the time when John Pink took the lease of June, 1830, down to the time when possession was delivered up to the appellants, been occupied in trust for John Hiatt's estate, the only question that is necessary to be determined as preliminary to the decision of the present case is, was that occupation authorized by the will of John Hiatt; or, if not, was it sanctioned by the court, so as to bind the parties interested in the trust estate of John Hiatt? His will contained no power to take a lease of the Byndloss moiety, and the taking the lease was a speculation not authorized by the general power of management conferred by the will. Still, when I consider that the operation of the Byndloss moiety was, in itself, a fair transaction, and one which appears, from what the Master has found, to have been beneficial to the trust estate of John

Harrison v. Randall

Hiatt; that it was entered into by the receivers, who are the officers of the Court; that the parties not under disability were apprized of and acquiesced in it; that it was never opposed on behalf of any of the parties who were under disability; that it was in a manner sanctioned by the Court of Chancery in Jamaica, in a suit which was ancillary to the suit in this court; I am of opinion that the transaction is binding on the parties interested in the trust estate. Such being the case, I think that the order made by the Vice-Chancellor as to the rent was right.

But upon the same principle I think he should also have given relief in respect of the dilapidations. There was a covenant in the lease to keep the estate in the same cultivation, order, repair, state, and condition; and the intended second lease was to be like the first, except as regards the amount of rent; and I conceive that a continued obligation on the part of the receivers to keep up the estate must be implied, and that it would be contrary to common honesty to allow the appellants to suffer so enormous a loss through the neglect and mismanagement of the receivers. If the persons interested in this trust estate must, for the reasons I have stated, be held responsible for the acts of the receivers in regard to the rent, I consider they must be equally responsible in regard to the dilapidations. There must, therefore, be a reference to the Master to ascertain the amount of dilapidations. It has been objected, that the Master went beyond the terms of the reference. With respect to this, I think that the reference in the first order ought to have been, in terms, as general as those which are contained in the prayer of the first petition. But I consider that the liberty to state special circumstances authorized him in making the statements he has made. Indeed, to restrict the Master to special circumstances, relating to the precise subject of the *specific* inquiry, would be, in many cases, needlessly to prevent him from stating circumstances essential to the due administration of justice, and would, in fact, nullify the design of the court in inserting such words in a decree.

HARRISON v. RANDALL.¹

July 16, 17, 18, 19, 21, and 22, 1851, and January 19, 1852.

Trustee and Cestui que Trust.

By indenture of 1821 six policies on the life of the father were declared to be held on trust for such one or more of eight daughters, or of the issue of any of them, as the father should by deed or will appoint; but the declaration of trust was not executed by the trustee. In October, 1832, the father executed an appointment of all the bonuses then declared on two of the policies, to three of the daughters absolutely; and then he and the three appointees directed those bonuses to be surrendered to the office, and the price of them, or the greater part of that price, applied for the purpose of keeping all the six policies on foot. Part of

Harrison v. Randall.

the price was applied in paying a debt of the father's; the remainder went to the three appointees, for their own purposes. In December, 1832, the father appointed the sums mentioned in the same two policies to certain others of his daughters, for the apparent purpose of equalizing the shares. A suit was instituted in 1833 for the purpose of appointing a new trustee; but these facts were not then stated to the court:—

Held, on a bill filed in 1842 by two of the daughters, who were not *sui juris* in 1832, for the purpose of setting aside the appointment of October, 1832,

First, that the transactions amounted to a clear breach of trust; but,

Secondly, that the two appointments, of October and December, forming part of one transaction, must stand or fall together; and therefore,

Thirdly, the bill was dismissed, with costs, with liberty to the plaintiffs to file such other bill as they might be advised.

THE facts are sufficiently stated in the judgment.

Swanston, James Parker, and Haddan, for the plaintiffs.

Bethell, Willcock, and Prendergast, for the defendants Randall and Simmons.

Chandless and Pearce Peachey for the defendants in the same interest as the plaintiffs.

January 19, 1852. SIR G. TURNER, V. C. The bill in this case was filed for setting aside an appointment made by a deed-poll, dated the 3rd October, 1832, and to have it declared that the payment made by Jonathan Brundrett, under that instrument, was a breach of trust, and to charge his estate with making good the same. The facts of the case were, that Colonel Gwynne was the tenant for life of an estate in Wales, subject to a term of 500 years, with remainder to his first or only son in tail male, with remainders over. Colonel Gwynne had one son and eight daughters. He was also entitled to certain policies on his own life in different offices, to which it is necessary to have regard in considering the provision afterwards made for his daughters, namely, two policies for 4000*l.* and 1000*l.* respectively with the Equitable Assurance Office; two policies for 4000*l.* and 1000*l.* respectively with the Albion; and two other policies for similar amounts of 4000*l.* and 1000*l.* respectively with the Pelican Assurance Office. By indenture of the 12th May, 1803, the 4000*l.* Pelican policy was assigned to Thomas Lowten, upon trust for such of the daughters as the wife, Mary Ann Gwynne, should appoint, with provisions in default of appointment, which, as an appointment was duly made, never took effect; and at the same time there was a demise made of part of the estates of Colonel Gwynne to the said Thomas Lowten for ninety-nine years, if he, Colonel Gwynne, should so long live, upon trusts for securing the premiums upon the policy; and on the 18th December, 1811, there was a similar assignment of the 1000*l.* Pelican policy, upon similar trusts as to the children, and the premiums of that policy were to be secured by the demise in question.

Mary Ann Gwynne, the wife of Colonel Gwynne, died in April, 1818, having by her will, dated the 13th July, 1810, appointed 100*l.*,

Harrison v. Randall.

part of the 4000*l.* Pelican policy, to the son, and the residue equally among the eight daughters. No appointment of the other 1000*l.* Pelican policy to the daughters seems to have been made. In the month of August, 1821, Sackville Frederick Gwynne, the son, attained twenty-one years, and shortly afterwards an indenture, dated the 28th August, 1821, was executed, for carrying out certain family arrangements, between Colonel Gwynne of the first part, Sackville Frederick Gwynne, the son, of the second part, John M. Goodere of the third part, and Jonathan Brundrett of the fourth part. By this indenture, after reciting the creation of the entail, and the intention to bar it by a recovery, and the agreement to vest in a trustee for the benefit of the eight daughters the whole of the said six policies of assurance; and for securing an annuity of 500*l.* per annum to the son during the life of Colonel Gwynne, subject to augmentation as there mentioned; and for securing a provision for keeping the policies on foot; and that in consideration of such agreement, by two indentures of even date therewith, and indorsed respectively as the said two indentures of May, 1803, and December, 1811, the said policies therein comprised had been assigned to Jonathan Brundrett as a trustee; Colonel Gwynne conveyed his estate to uses for securing to the son an annuity of 500*l.* per annum during the life of his father, with remainder to Jonathan Brundrett for 1000 years, upon trust, with remainders over, which are immaterial to be here mentioned. The trusts of the term of 1000 years were declared to be for the purpose of raising from time to time sufficient sums to pay the annual premiums on the six policies, and for all the costs and expenses of executing the trusts and indemnifying the trustees, and to pay premiums on any policies which might be substituted for the six policies, or any of them, and in the mean time to follow the inheritance.

By the same deed power was reserved to Colonel Gwynne to charge the estate with 25,000*l.* This deed was not executed by Jonathan Brundrett, nor were the indentures of even date recited in it executed by any of the parties thereto; but by an indenture of the 1st October, 1821, between Thomas Lowten, the nephew, of the first part, Colonel Gwynne of the second part, Sackville Frederick Gwynne, the son, of the third part, and Jonathan Brundrett of the fourth part, reciting the indenture of May, 1803, and that Thomas Lowten, the nephew, was the executor of Thomas Lowten, the assignee under that indenture of May, 1803, Jonathan Brundrett was appointed a trustee in the room of Thomas Lowten, and Lowten purports to assign accordingly to Jonathan Brundrett the policy comprised in that indenture, (which was the 4000*l.* Pelican policy,) on the trusts of the will of the said Mary Ann Gwynne; and then Colonel Gwynne and his son assign the other, the 1000*l.* Pelican policy, both the Equitable policies, and both the Albion policies, "and all moneys to be recovered by virtue of the said policies," to Jonathan Brundrett, upon trust, as to the four last policies, "for all or any one or more of [the said eight daughters,] or any one or more of the children or other issue of such daughters, or any of them, such children and issue respectively to be born before any such appoint-

Harrison v. Randall.

ment as therein mentioned should be made to or for him, her, or them, in such manner and form, if more than one, in such parts, shares, or proportions, and for such terms, with such limitations over or substitutions in favor of any one or more of the others of the said daughters, or their children and issue respectively, and either by way of annuity, legacy, portion, remainders present or remote, interest, or otherwise, and to vest and be payable, and paid, transferred, and assigned, at such time or times, age or ages, and upon such contingencies, and under and subject to such directions and regulations for maintenance, education, advancement, conditions, and restrictions," as Colonel Gwynne should by deed or will appoint; and, in default of such appointment, then the said four policies and premiums were to go upon the same trusts as were declared by the said will of Mary Ann Gwynne. These indentures were executed only by Colonel Gwynne, and not by Lowten or Brundrett. Jonathan Brundrett was a solicitor, one of a firm; and it appears that at first the remittances from Colonel Gwynne came with tolerable regularity, but after a time they were more remiss, and the money for the premiums was from time to time advanced by the firm, of which Brundrett was a member, up to the year 1832. In that year, and in consequence, as alleged, of an arrangement between Colonel Gwynne and Jonathan Brundrett, a deed-poll was executed, bearing date the 3d October, 1832, by which Colonel Gwynne, reciting that certain bonuses had been declared on the two Equitable policies, appointed all the said bonuses to Catherine, Jane, and Edmundina Gwynne, three of the eight daughters, and their respective executors, administrators, and assigns, equally, to be received by them either immediately, by arrangement with the Equitable Company, or, after the decease of Colonel Gwynne, as the three daughters, the appointees, should think fit.

This is the appointment which is impeached by the present bill. The three daughters, the appointees, were the only daughters *sui juris*, and living in England at the time, with the exception of Charlotte Elizabeth Gwynne, who had been applied to, but declined, to be an appointee for the purposes of the arrangement in question, or to have any thing to do with the arrangements of which the appointment was the first step.

On the 24th October, 1832, Colonel Gwynne and his three daughters, the appointees, signed an authority to Colonel Gwynne and Jonathan Brundrett, by which they were to be at liberty to receive and invest the amount of such bonuses, such investment to stand as a security for the payment of the premiums on the policies, with a power also to have recourse to part of the lands for the same purpose; but that authority was never acted upon. On the 24th November, 1833, the same three daughters, the appointees, together with Colonel Gwynne, signed another authority to Colonel Gwynne and Jonathan Brundrett, which was in the following terms:— [His honor read the document, which was an authority to receive the present value of the bonuses, valued at 3683*l.* 19*s.*, and to invest 1600*l.*, part thereof, in consols or exchequer bills, for the purpose of keeping down the premiums on all the six policies, and further, to pay an additional sum

Harrison v. Randall.

of 50*l*. for obtaining possession of the 1000*l*. Equitable policy out of the hands of a Mr. King, who, it appeared, claimed a lien on it for some costs long since incurred.] This differs very materially from the terms of the last authority, under which the whole fund was to be made liable for these premiums; here we have only 1600*l*. made liable.

Again: in the authority of the 24th October there was a power to resort to the estate; in the authority of the 24th November there is not a word about the estate. The terms of the authority of the 24th November seem to have alarmed Mr. Brundrett, for he soon afterwards consulted counsel on the validity of these arrangements. [His honor read portions of the case and opinion, from which it clearly appeared that Mr. Brundrett was aware that the transaction was, in fact, a breach of trust.] After this opinion, and no doubt in consequence of it, an indenture was executed, dated the 14th December, 1832, by which Colonel Gwynne made a further appointment of the sums of 4000*l*. and 1000*l*. secured by the two Equitable policies to four other of the eight daughters, viz. Charlotte, Julia, Emma, and Georgiana. It appears that the bonuses declared up to and including the year 1830, and which would be payable on the death of Colonel Gwynne, in respect of those two policies, amounted to 6570*l*., and that the office was willing immediately to give 3683*l*. 19*s*. for the surrender of those bonuses. On comparing this amount with the amount of the Equitable policies, and allowing for the difference of the number of appointees, it is clear that the object was to place all the appointees as nearly as possible on the same footing, so as to give as fair an appearance as possible to the appointment of the 3d October, 1832; and the paper of calculations proved in the cause shows this to have been the case. The shares of the four daughters, the appointees of the two policies of 4000*l*. and 1000*l*. respectively, would have been 1250*l*. each, and the shares of the three daughters, appointees of the 3683*l*. 19*s*. would have been 1228*l*. each. It is quite clear that the appointment of the 14th December was made on this principle.¹ An agreement was at the same time prepared by Jonathan Brundrett, but never executed. It purported to be made between Colonel Gwynne and the three daughters, the appointees of the 3d October, 1832.

Immediately after the execution of the appointment of the 14th December, 1832, and by a deed-poll dated the 15th December, 1832, the three appointees gave Jonathan Brundrett a power of attorney to receive the amount of the present value of the bonuses declared on both the Equitable policies; and on the 19th December, Jonathan Brundrett surrendered the bonuses on both the policies, and received the 3683*l*. 19*s*., signing twice, and that sum remained in his possession for some months. Lowten had before this applied to this court

¹ It is not very material, but it may be observed that such a calculation is quite erroneous. The 3683*l*. 19*s*. was cash, the present value of 6570*l*. worth of bonuses, the amount receivable if deferred to the death of Colonel Gwynne, when the two sums of 4000*l*. and 1000*l*. would fall due. The four daughters, therefore, would each receive 1250*l*. on the decease of Colonel Gwynne; the three daughters 2190*l*. each at the same period — nearly as much again.

Harrison v. Randall.

to be relieved from the trusts, and Brundrett had joined in this request, being also desirous to retire from the trust; but on the arrangement to receive and invest the 3683*l.* 19*s.* Brundrett agreed to remain. Afterwards, when not more than 1600*l.* was to be invested, he again determined to retire, and filed his supplemental bill, stating the documents, but none of the circumstances attending the preparation or execution of them. By decree of the 11th February, 1833, a reference to the Master was directed, to appoint new trustees, and for the taxation of costs; and there was a direction as to the moneys received by Brundrett, that, after payment or retainer of his costs and disbursements, they were to be paid to the three appointees. Under this decree Harries and Rice were appointed trustees in the room of Lowten and Brundrett, and an assignment was made accordingly of all the trust property; and in May and June, 1833, Brundrett was paid his taxed costs, and he paid over the balance, deducting 423*l.* advanced by him or by his firm for satisfying the premiums, and otherwise in keeping the said policies on foot. By a deed-poll of the 6th June, 1833, Colonel Gwynne appointed all subsequent bonuses to all the eight daughters equally. The three appointees subsequently lent to Colonel Gwynne, for his own purposes, 1624*l.*, part of the moneys received, on the surrender of the bonuses on the Equitable policies, upon the security of a mortgage of the life estate of the Colonel, by an indenture of mortgage dated the 13th June, 1833; and by an indenture dated the 24th August, 1836, and made between the eight daughters and the husband of the married daughter, it was covenanted, agreed, and declared, that the five daughters should stand equally interested with the three daughters in the two Albion policies, so as to equalize their portions as far as possible.

Colonel Gwynne died on the 6th September, 1836, and shortly afterwards Rice, being desirous of retiring from the trusts, by an indenture dated the 12th April, 1837, which fully recited every deed and circumstance, (except as to two sums, which are not material to be considered;) reciting also that Sackville Frederick Gwynne, the son, had renounced all claim to the 100*l.* under his mother's will of May, 1803, and that the eight daughters were entitled equally to the 4,000*l.* Pelican policy, and also, under certain indentures, to the 1000*l.* Pelican policy; and reciting also the state of matters as to the Equitable and Albion policies, one Mr. Herbert was appointed trustee in the room of Rice, and the funds were transferred and assigned accordingly. This arrangement, however, was of a very brief duration, for five days later, by an indenture dated the 17th April, 1837, which also contained full recitals of all the material circumstances, Thomas France was appointed trustee in the place of Herbert; and on the 9th September, 1837, France, as solicitor to the trust, addressed a letter to Brundrett on the subject of the breach of trust alleged to have been involved in the transactions of 1832, to which Brundrett replied, refusing to recoup. [His honor read the letters.] On the 4th May, 1841, Brundrett died, the defendants, Randall and Simmons, becoming his personal representatives; and on the 5th September, 1842, this bill was filed, five years after the claim made by Mr.

Harrison v. Randall.

France's letter. The plaintiffs are the two youngest daughters, who were infants at the time of the transactions in 1832; but one of them attained her age of twenty-one years in 1833, and did not marry until 1838; the other plaintiff did not attain her full age until 1837, and was unmarried at the time of filing the bill. The defendants are Randall and Simmons, the executors of Brundrett. France and Harries, the trustees, and the other surviving daughters, and the husbands of such as are married, are also parties to the suit. Charlotte, the daughter who was requested but declined to take a part in the arrangements of 1832, had died in 1840, leaving France her executor.

The answer of the representatives of Brundrett stated, that from 1812 to 1833 he had paid the premiums and kept up the policies out of moneys belonging to the firm. They rely upon Brundrett not having executed the indenture of 1821 until 1832, and they set forth a long correspondence, which, in my view of the case, it is not material to go through. The only material evidence in the cause are the deeds, documents, and letters which are proved or admitted.

There are three points, which are to be considered successively. First, whether Brundrett was ever liable to the plaintiffs in respect to the matters complained of in this suit; secondly, whether the suit, supposing that Brundrett is in some respect liable to the plaintiffs, and therefore may in some mode be called to an account, is properly constructed to obtain the relief prayed; and, thirdly, we must determine whether, if the suit be not properly constructed, it is a fit case to dismiss the bill without reservation; or, on the other hand, if it be properly constructed, whether there should be an absolute decree against the defendants. On the first point I have no doubt. Brundrett accepted the trusts of the indenture of 1821; and the appointment of October, 1832, and the subsequent transactions following up that appointment, amount to a direct fraud upon those trusts, and Brundrett must have been aware, and the documentary evidence in this suit proves that he was fully aware, of the fact when he received and paid over the moneys under that appointment.

After the cases which have been decided, it is unnecessary for me to say much on this head: the immediate object of the arrangement was to relieve the father. Further: when a trustee is fully aware of the transaction in which he is engaged being a fraud upon his trust, he must take the consequences of his own acts: and here the moneys received were immediately paid to the father. That Brundrett was perfectly aware of what he was about is evident; but it is attempted to justify his conduct on the necessity of the case. I agree that a trustee is not always to be charged upon the ground of deviating from the strict letter of his trust; it may be necessary or beneficial that he should do so; but then, if he takes upon him so to deviate, he does so on the terms of afterwards showing to the court that it was necessary or beneficial to his *cestui que trust*; and this is not shown here. There was a suit immediately after these transactions, for the appointment of a new trustee, and yet the facts were not brought before the knowledge of the court, but the court was allowed to make

Harrison v. Randall.

the appointment and give directions in the dark. Brundrett, therefore, would be clearly liable to this suit, if the second point be also decided against him, that is, if the suit be properly constituted, so as to enable the plaintiffs to obtain the relief prayed. To determine this, we must consider the suit in 1833, and the various documents and indentures which were entered into before that suit; and, looking at the two indentures of the 3rd October, 1832, and 14th December, 1832, it is manifest that the former of these two indentures is a mere color for the latter, and that the latter would never have existed but for the former. They form, therefore, one entire transaction, and must stand or fall together. But this bill only seeks to set aside one of these indentures, viz., that of the 3rd of October, 1832—only to undo part of one entire transaction. But this is contrary to all the precedents and practice of the court. That it is not consistent with justice in the present case is obvious, because the result would be to leave the plaintiffs in possession of upwards of 1200*l.*, which they obtained under this fraudulent appointment, and at the same time to restore to them the bonuses of which they were deprived by the same fraudulent appointment. This objection, though obscurely, is yet sufficiently, pointed out by the answer, and being so taken, and being in my opinion fatal, the bill must be dismissed.

It only remains to be considered whether, under such circumstances, the bill is to be dismissed absolutely, and whether with or without any special direction as to costs. I feel that I cannot dismiss these plaintiffs without leaving them at liberty to file a new bill; for they have, as I have already shown, established a case against Brundrett; and there is something coming to them from him, of which, in a suit properly constituted, they might possibly obtain the benefit. But I say not a word to encourage the institution of any such suit, because I could not make a decree for an account without directing very strict inquiries as to the knowledge of the plaintiffs in relation to all the matters in question, and as to how far they had, in fact, bound themselves by their own acts; and I have a very strong suspicion of what might turn out as the result of these inquiries. The plaintiffs having brought this bill to a hearing in a form in which, according to my view of the case, no relief can be given, praying for relief against one of two instruments only, which must stand or fall together, and it being impossible in this suit to set aside both instruments, and the objection having been pointed out in the answer, the present bill must be dismissed, with costs, without prejudice, however, to the plaintiffs bringing a new bill, if they shall so think proper after the observations I have felt it my duty to make.

Wood v. Sutcliffe.

WOOD v. SUTCLIFFE.¹

December 1, 3, and 4, 1851.

Injunction — Action — Stream.

In granting an injunction after a plaintiff has established his right at law, the court is not guided by the amount of damages: the court will consider whether the injunction will afford the plaintiff the relief to which he is entitled, and will not grant it merely because the plaintiff has a legal right to the thing sought to be protected.

As to the right to use the water of a stream generally.

THIS was a motion for an injunction under circumstances which are very fully stated in the judgment.

Roll, Malins, and Elderton showed cause against the injunction. This court will not restrain a person from committing a nuisance merely because it is a nuisance at common law, but will consider the balance of inconvenience. In the case of waste the court interferes more readily, because there is privity between the plaintiff and defendant. At first the court hesitated in the case of trespass, because the injury was not irremediable; *Crockford v. Alexander*, 15 Ves. 138; and unless the trespass is destructive the court will not interfere. *Smith v. Collyer*, 8 Ves. 89. The only reason why the court interferes in the case of copyright, where the damages are nominal, is, that the plaintiff has otherwise no adequate remedy. *Wilkins v. Aikin*, 17 Ves. 422; *Baily v. Taylor*, 1 Russ. & M. 73. It also interferes to prevent a multiplicity of suits, but only when the injury is such as would justify a multiplicity. *The Attorney-General v. Nichol*, 16 Ves. 338; *Elmhirst v. Spencer*, 2 Mac. & G. 45; *The Rochdale Canal Company v. King*, 14 Jur. 16; *Ripon v. Hobart*, 8 My. & K. 178.

Bethell and Daniel, in support of the injunction. The cases of *Parrott v. Palmer*, 3 My. & K. 632; *Bedford v. The British Museum*, 2 My. & K. 552; *Weller v. Smeaton*, 1 Bro. C. C. 572; *Dann v. Spurrier*, 7 Ves. 231; *Barret v. Blagrove*, 6 Ves. 104; *Robinson v. Walcott*, 5 Ves. 552; and *Regina v. Chorley*, 12 Q. B. 515, were cited; and also *Wood v. Waud*, 13 Jur. 472, where the plaintiff had established a similar right at law.

December 4. SIR R. T. KINDERSLEY, V. C. The injunction which is asked for, is an injunction to restrain the defendant, Sutcliffe, from pouring into this stream or beck, called the "Bowling Beck," by means of that channel which connects his works with the beck, any dye-wares, or dye-liquors, or madder, or indigo, or potash, or matters of that description, or any other matters which tend to pollute the stream to the damage of the plaintiffs' works. Now, the case which the plaintiffs make in support of this application may be stated, in substance, to be this:— They say that many years ago— more than

Wood v. Sutcliffe.

twenty years ago — they established their works on this stream or beck, their works being those of worsted spinners: that at the time when they established their works, this stream came to their works in a pure and serviceable state: that they have acquired by long user, as against all new comers, a right to have the water still come to them in that pure state, not that they affect, of course, to be the proprietors of the stream, or the proprietors of the water through the stream, but the proprietors of the right to have the water come to their works in a pure and serviceable state, and that they have that right as against Mr. Sutcliffe, whose works are of comparatively recent construction, being only completed in the early part of the year 1845, and that Mr. Sutcliffe, by means of his dye-works, does pollute the stream — pollutes it by a coloring matter, and by the other matters which are held in suspension in the water as it floats down to the plaintiffs' mills, and that by that means the plaintiffs are damnified in the carrying on of their works: and that, moreover, the plaintiffs have brought an action against Mr. Sutcliffe, in which action Mr. Sutcliffe did not raise the question of the right of the plaintiffs, but put in issue only the questions, whether the operations of the defendant did damage the right of the plaintiffs, and whether there was any and what damage arising from the works of the defendant: that in that action the plaintiffs have recovered a verdict, and that verdict was followed by judgment, and that judgment was entered up in January, 1851.

The plaintiffs insist, that inasmuch as their right is clearly established — not, in fact, controverted by Mr. Sutcliffe — and inasmuch as the verdict of the jury has established that that right is infringed and damaged by Sutcliffe, and inasmuch as the acts constituting that injury are continuous acts, they have a right to come to a court of equity, and ask the court to give effect to the legal right, by restraining the defendant in the continuance of those acts. Now, there is no doubt that a person establishing works on a stream may, by long user of the water of that stream, although he has no proprietorship of the river or the water, acquire a right such as that which the plaintiffs here insist they have; and it appears to me clearly established that they have such a right, — such a legal right, I mean, to have the water come to them in a pure and unpolluted state, so that no pollutions or impurities in the water, which are poured in by other persons who may be called new comers, shall interfere with the effective carrying on of the works of the plaintiffs' manufactory. And not only may a person acquire such a right as that which I have mentioned, but I may observe that he may also acquire another right, which is, that whereas the carrying on of his manufactures may require him to pollute the water which he uses, he may have acquired a right to pour his polluted water into the stream as against all new comers, so that those below him, coming after he has acquired the right, may not have the right to complain of what he does to the stream, while he may still have a right to complain of what new comers do above him with respect to the pollution of the stream. It is not, however, necessary to consider whether the plaintiffs have acquired the latter right to pollute the stream as against those below

them, because that is not at all now in question; but it appears to me that the plaintiffs have clearly established the first of those rights, namely, the right to have the water come to their works in a pure and unpolluted state. Now, that being the legal right of the plaintiffs, the question arises — and that is a question which comes in controversy here — what right does that give them to apply to a court of equity for an injunction.

It is not my intention to enter at all into a general disquisition upon the grounds on which courts of equity will interfere in all the different sorts of cases which arise, in which the courts have been applied to for injunctions to restrain acts done, to the injury of the plaintiffs, but I shall confine my observations entirely to the precise sort of case that this is; for it would be of no service to attempt to enter into a disquisition, even if I were competent to do it, in this summary way. Now, I conceive that if the plaintiffs have established such a legal right as that which I have mentioned, and while they are in the enjoyment of that right another person comes and erects machinery or any manufacturing works on that same stream above the plaintiffs' works, and by his manufacturing process so fouls the water as that, instead of coming, as before, pure and unsullied to the plaintiffs' works, it arrives at the plaintiffs' works in a less pure and serviceable state than before, so as *seriously* and *continuously* to obstruct the effective carrying on of the plaintiffs' manufacture — if that be the case, and if the restraining of those acts by injunction will restore, or tend to restore, the plaintiffs to the position in which they have a right to stand, and in which they before stood; and if the injury which is occasioned by the works complained of is of such a nature as that the recovery of pecuniary damages would not afford an adequate compensation — that is, such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before; and if, moreover, (for there are several conditions,) the plaintiffs do not sleep upon their rights, and do not acquiesce, either actively or passively, in the acts which they now complain of, but use due diligence and vigilance to take such steps as are proper and necessary for the vindication of their rights — if those conditions occur in such a case as that which is now presented here, the plaintiffs, the parties so injured, have, I conceive, as a general rule, a right to come to the court of equity, and say, "Do not put us to bring action after action for the purpose of recovering damages, but interpose by a strong hand, and prevent the continuance of those acts altogether, in order that our legal rights may be protected and secured to us." I say as a general rule and principle, because it must not be forgotten, that of necessity, whenever a court of equity is asked for an injunction in cases of this nature, or at all resembling this, it must have regard not only to the dry strict rights of the plaintiff and defendant, but must have regard to the surrounding circumstances — to the rights and interests of other persons which may be more or less involved in it. I have used the term "serious obstruction," because I cannot concur in the proposition, (if it is meant to be asserted,) that on the mere dry fact of the plaintiffs' hav-

ing the abstract right, and that right being infringed, in ever so minute a way, or ever so little to the practical damnification of the plaintiffs, the court of equity will, as a matter of course, upon the right being established at law, grant an injunction.

On the other hand, I am far from saying, that because, in the action at law, the court of law and a jury have only given a shilling damages, or a farthing damages, that is a ground for saying that the injury is not serious, and that it may not be a case for granting the injunction. I have also used the term "continuous injury." By "continuous" I do not mean never ceasing, but of recurring at repeated intervals, so as to be of repeated occurrence, and so as to be of the same sort of damnification to the plaintiffs as an actual continuous mischief would be. It appears to me also, as I have said, that one of the conditions requisite to induce the court to grant an injunction in such a case as that, is, that by granting an injunction, by stopping the acts complained of, the party complaining, who has got the legal right, will be restored, or rather that the injunction will restore, or tend to restore, the party complaining, to the right he has established as against the defendant. And I put it in that way for this reason. I conceive that it would be no defence to an application of this sort for the defendant to say, (and I do not understand that that is what the counsel for the defendant mean to say,) "It may be true, that what I am doing does in some degree damage the plaintiffs, and prevent their effectual carrying on of their works; but there is another person, A B, who is as much a wrongdoer as I am, who is doing ten times more harm than I am doing, and although what I pour into the stream is not pure, it is so much purer than what he pours into the stream, that, in fact, when you get the water, it is purer when it arrives at your mills, or your works, than it would have been if A B's pollutions had been poured in without the admixture of my less polluted water." I do not understand that this is intended to be contended for by the defendant's counsel, but I mention that as a reason why I use the term in endeavoring to enunciate what I conceive is applicable to this particular sort of case. I am not speaking of copyright cases, or other cases, which may stand on a different footing; but I am stating the reason why it appears to me, that, to induce the court of equity to interfere by injunction, its injunction must restore, or tend to restore, the plaintiff to the full exercise of his rights; because, in such a case as I have put, as the plaintiff must pursue each of the wrongdoers separately, unless they are acting in partnership or in concert together, as they are separate acts, the plaintiff, who would have, in the case I am supposing, a clear right to prevent the aggregate of the mischief if it were all inflicted by one person, would be prevented from being set right, if, instead of the mischief being all perpetrated by one person, half was perpetrated by one person, and half by a second person.

Now, I do not conceive that I have laid down any proposition, either as a new proposition, or as a proposition which might not require a good deal of modification and alteration in the application of it to the different classes of cases from that which is now before

Wood v. Sutcliffe.

me. I have only endeavored to state what I conceive to be the requisites necessary, in such a case as that now presented to me, to induce a court of equity to interfere by injunction; and it is to be borne in mind, that what I am here to decide is something even narrower than that; for what I have to decide is, whether the plaintiffs are entitled to an injunction upon this motion. [His honor then observed that there was little controversy on the affidavits, and made a further statement of the case, and then proceeded.] Besides the various manufacturing works which have been established on the banks of this stream, a very large and dense population has gradually sprung up on the banks, or contiguous to the banks, of the stream. There was, no doubt, a time, and probably not very far remote, when the stream, or that portion of it which lies between Messrs. Ripley's and the plaintiff's works, flowed through open fields and meadows, and through cultivated ground. That for some time past has ceased to be the case, and a very large population has sprung up, contained in, I think it is stated, 1600 houses, which have been built in streets, as a sort of continuation of or suburb to Bradford, which lies somewhat lower down the stream. These streets of houses do more or less pour sewerage into the stream in question.

Now, every one knows, that wherever human beings congregate in great numbers on the banks of a stream, irrespective of all manufactures, it has the effect of polluting and altering the character of the stream. It is an inevitable consequence, and no vigilance can prevent it; and I am satisfied, from the evidence, that, to some considerable extent, the pollution of this stream — I do not say from the defendant's works, or anybody's works in particular — but, to some considerable extent, the pollution of this stream is inevitable, and that no court of law or court of equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which now congregate about its banks, ever could restore this stream to the state in which it once was. But still it does not follow, that because there be a certain degree of pollution, which perhaps cannot be very accurately measured, and which is inevitable, therefore everybody has a right to pollute the stream, by pouring in immense quantities of filth and pollution from his own works, to make the stream ten thousand times worse.

Now, it appears, that although, doubtless, there had been a considerable degree of deterioration of the stream, from various causes, up to the year 1844, there appears never to have been any dispute between the riparian owners upon the stream. The plaintiffs have themselves been obliged to submit to the inevitable effect of a large population upon every stream, which occurred to this — that is to say, the ceasing to use this stream for the purpose of washing their wool, and have been obliged to sink a well for that purpose, and for the purpose of raising steam; but still, occasionally, when the machinery of the well was out of order, they used the water of the river, and they also used it for the purpose of condensing steam. In 1845, they brought an action against Messrs. Waud for polluting the stream, in which the question of right was raised, and they recovered a verdict

Wood v. Sutcliffe.

in the month of August, 1849. About the year 1845 the present defendant began to erect his works, but did not receive any notice from the plaintiffs till 1850, after which the plaintiffs brought an action, and recovered one farthing damages; and though the question of right might not have been raised before the jury, still it must have been raised on the pleadings; and though the jury found that the damage then proved was only one farthing, *non constat* that the damage may not be estimated at 100*l*. The defendant's dye-works, we know, did not come into operation until the early part of 1845. Then, were the plaintiffs, before the defendant's works came into operation, able to use the water of the stream for their works, either in the shape of using it for washing wool, or in the shape of using it in boilers? Clearly not: and that affords a very strong ground for saying that the mere removal of the defendant's works, or preventing the defendant from carrying on his works in the manner in which he now does, really would not have the effect of causing the water of this stream to come down to the plaintiffs' works in the same pure and unpolluted state which the plaintiffs, according to their original right, would have a right to have.

But, in fact, I feel upon the evidence in this case, and not only upon the evidence in this case, but from what must take place with all streams, that as time goes on, and trade and manufactures increase, and as even the mere habitations on the banks of these streams increase, there must be that gradual and inevitable deterioration of the water which, irrespective of the plaintiffs' right to prevent A, B, C, or D, from pouring in their dye, matter, or any other pollution into the stream, will render the water in time unfit for use for certain purposes, and for such a purpose as the washing of wools. I do not feel sure, therefore, even if it turned upon this part of the case, that the granting this injunction, while it would have the effect, if not of ruining the defendant, of doing him most serious mischief, would, on the other hand, have the effect of benefiting the plaintiffs, by restoring them, or tending to restore them, to the rights which they contend for, and which I admit they have. But it does not rest merely upon that.

Another condition, which I conceive, beyond all controversy, is a necessary condition to induce a court of equity to interfere by injunction in a case similar to that now before me, is, that the mischief complained of is such as cannot properly and equitably be compensated by pecuniary damages. Now, let us see how this matter stands. For years past, and long before the defendant began his works, the plaintiffs really had not had the use of the beck for washing purposes or for boiling purposes. Other persons, carrying on either the same trade as the plaintiffs themselves, or trades of a similar description, have entered into arrangements with the plaintiffs, that although what those other parties do does tend to pollute the stream to the damnification of the plaintiffs, they shall continue to do that during fourteen hours out of the twenty-four, and shall pay a certain rent or tax for the right to do it. Now, if an arrangement can be made such as that by which, even without litigation, the plaintiffs and other parties, of whom

the plaintiffs complain, may come to an arrangement — and I do not at all agree with the defendant's counsel, that that amounts to an attempt to levy a tax upon those persons, and to use a strict right merely to enforce an unrighteous demand of money from the party — but if that be the case, surely the bringing of actions against the party, who ought, as the plaintiffs say, to come to such arrangement, if he will, would be nearly as efficacious — I will not say as efficacious — but might just as well be used to bring them to those terms.

Ought I, then, to grant an injunction for the purpose of compelling the defendant to come to terms, by which he is to pay the plaintiffs so much for using it so many hours, or to come to any other arrangement? If any force applied to the defendant would bring him to that, I think I ought to leave him to the force which would be applied by means of actions brought, where all this could be represented to the jury; and if the jury were satisfied that he would not come to terms, the jury could say, "Instead of a farthing or a shilling, or forty shillings, we will give you 50*l*. or 100*l*. for the damage which has been inflicted upon you by the defendant." It appears to me that even the plaintiffs themselves have shown that it is a matter which may in some way be compensated by money. But I do not rest my decision upon either of those two points. The principal ground upon which I conceive I must refuse this injunction is, I will not say the acquiescence of the plaintiffs, using that term in the active sense, but the fact that, from the beginning of 1845 down to the beginning of 1850, the defendant was allowed to construct and to use his dye-works for a period of five years, without a hint being given on the part of the plaintiffs that he was doing any thing which he had not a lawful right to do. [His honor then proceeded to argue, that, from the nature of the case, the plaintiffs must have known that these dye-works were building, and should have given notice to the defendant; and that the defendant, finding the stream already used by many persons, could not be aware that he was infringing any right.] He then said — I consider this the principal point, and I should be of opinion that the plaintiffs were not entitled to an injunction upon this motion. Upon the second of the points, as to its being capable of being compensated by money, I incline to think that I should not grant the injunction; and I very much doubt whether I should grant the injunction upon the other ground, namely, that I should inflict serious damage upon the defendant, without doing any practical good to the plaintiffs. I therefore refuse this motion, reserving the costs until the hearing of the cause.

Re Yates.

*Re THE TRUSTEE RELIEF ACT, 10 & 11 VICT. c. 96; Re THE TRUSTS OF THE EXECUTORSHIP OF WILLIAM YATES, Deceased.*¹

December 6, and 8, 1851.

Will— Construction of Executory Bequest in Case of a Legatee dying before "being entitled in Possession."

The will of the testator in this matter contained a bequest of 25,000*l.* to trustees, upon trust to invest the same, and to pay the interest to his daughter for life, and from and after her decease, to pay the principal unto and amongst all her children equally, share and share alike, if more than one, and their respective executors, administrators, and assigns; and if but one, to that one, his or her executors, administrators, and assigns, "on the respective attainments of such children to the age of twenty-one years being sons, or on their respective attainments to that age, or day or days of marriage, being daughters;" the interest of their respective shares from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance: and in case any of the children of his said daughter "*should happen to die before being entitled in possession to his, her, or their share or shares*" under the will, the share of the child so dying was to go to the survivors or survivor of them. The daughter had two children only who attained twenty-one, the rest having died under age, and unmarried. One of these two children survived the testator, but died in the lifetime of her mother:—

Held, that the gift over did not take effect, but the personal representatives of the deceased child were entitled to her share.

WILLIAM YATES, by his will, dated the 15th January, 1810, bequeathed to his executors, thereafter named, 25,000*l.*, upon trust to invest the same as therein mentioned, and to pay the yearly dividends of such investment to the testator's daughter, Elizabeth, wife of Robert Peel, for and during her life, for her separate use; and the will then continued in the following words:—"And from and after the decease of my said daughter, in trust to pay and apply the said principal sum of 25,000*l.* unto and amongst all and every the child and children of my said daughter, Elizabeth, equally, share and share alike, if more than one, and their respective executors, administrators, and assigns; and if but one, then the whole to such one child, his or her executors, administrators, and assigns, on the respective attainments of such children to the age of twenty-one years being sons, or on their respective attainments to that age or day or days of marriage, which might first happen, being daughters; the interest, dividends, and proceeds of their respective portions being from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance and education, and all surplus of the said interest, dividends, and proceeds being from time to time placed out at interest, or invested and applied in like manner as the respective principal sums in respect of which the same surplus should arise. And in case any of the children of my said daughter, Elizabeth, should happen to die before being entitled in possession to his, her, or their share or shares under this my will, I do direct that the share or shares of such of them as may so happen to die shall go and be applied unto and

Re Yates.

amongst all and every the survivors of them, if more than one, equally, share and share alike; and if but one, then the whole to such one child, at such time and in such manner as their, his, or her original shares or share are and is by this my will directed to be paid and applied. And in case all the children of my said daughter, Elizabeth, shall happen to die before being entitled in possession to their respective shares under this my will, then the said principal sum of 25,000*l.* shall go and be applied unto and for the benefit of all my other grandchildren, (except the children of" Sir Robert Peel therein before mentioned, "who are not to participate therein), who, being sons, shall have attained or shall attain the age of twenty-one years, and being daughters, shall have attained or shall attain that age or marry, which shall first happen, their executors, administrators, and assigns, equally, share and share alike, to take *per capita*, and not *per stirpes*." And the said testator appointed T. Norris, J. Nightingale, and J. Ashworth, and the testator's son William Yates, executors of his said will. By a codicil, dated the 4th April, 1812, the testator substituted his son Edmund Yates as an executor in the room of the said J. Nightingale, but did not otherwise alter the above bequest in his said will. On the 17th July, 1813, the testator died, leaving his said daughter, Elizabeth Peel, and his said executors, surviving. All the executors proved the will. Edmund Yates died shortly after the testator. The executors appropriated the sum of 24,750*l.*, being the sum of 25,000*l.* minus legacy-duty, upon the trusts of the said will. Elizabeth Peel had only two children who attained twenty-one. These two were Ellen, who intermarried with James Peel Cockburn, both since deceased, and Ann the wife of Charles Wicksted Ethelston. All the other children of Elizabeth Peel died under age and unmarried. Ellen Cockburn died in July, 1841, in the lifetime of her mother, the said Elizabeth Peel. James Peel Cockburn survived his wife, and died in December, 1845. Sir James Cockburn, Bart., was the representative of the said James Peel Cockburn, and also of Ellen his said wife. No settlement had been made on the marriage of the said James Peel Cockburn and Ellen his wife. On the marriage of the said Charles Wicksted Ethelston and Ann his wife, a settlement, dated the 19th April, 1822, was executed, whereby the intended wife's share in the said legacy of 25,000*l.* was assured to Robert Peel, E. Haworth, and F. Peel, upon trust, after the solemnization of the marriage, to pay interest thereof to the said Ann Peel for her separate use for life, and after the decease of the said Ann Peel, to transfer the principal to the children of the marriage as she should appoint, and in default thereof, and subject thereto, in trust for such children as therein mentioned. In December, 1850, the surviving executors of the will of the said William Yates paid the said sum of 24,750*l.* into court under the Trustee Relief Act, 10 & 11 Vict. c. 96, to the above account. In pursuance of an order dated the 26th April, 1851, the said sum was invested in the purchase of 25,222*l.* 18*s.* 7*d.* consols, and the dividends were accumulated. The persons interested under Ann Ethelston's settlement, and the trustees thereof, now presented their petition under the Trustee Relief Act, claiming the said stock

Re Yates.

and accumulations of dividends, and praying that these sums might be transferred to the trustees, upon the trusts of the settlement. The petition prayed, in the alternative, that one moiety of these moneys might be so paid. The question was, whether the representatives of Ellen Cockburn were entitled to her share, or whether, under the gift over, it had survived to her sister, Ann Ethelston.

J. Russell and *Milne*, for the petition, argued that the gift over had taken effect: they said that the precise case upon words like those in this will had never occurred. In *Henderson v. Kennicot*, 2 De G. & S. 492, where the gift over was on the death of any of the legatees dying before they became entitled, the Vice-Chancellor said, that, but for the cases cited, he should have held the expression "entitled" to mean "entitled in possession;" evidently giving to those latter words the meaning contended for here. Here the words have a distinct meaning: this was not a gift under which any person could be entitled in possession until after the death of the tenant for life. When, therefore, the testator says, "if any die before they become entitled in possession," he says the same as though he had said "if any die in the lifetime of the wife."

[SIR J. PARKER, V. C. Will the original shares vest before twenty-one or marriage?]

No, they are contingent till then; the surviving shares must also be contingent till the survivorship happens.

[SIR J. PARKER, V. C. Is that clear as to the surviving shares? There are no words of contingency relating to them.]

They cited *Crowder v. Stone*, 3 Russ. 217.

Malins and *Collins*, contra, said that "entitled in possession" must have the same force and meaning for this purpose as the word "payable," and must refer to the time when the legatees would be first entitled in possession under the gift, if the preceding life interest did not intervene. They cited *Fry v. Lord Sherborne*, 3 Sim. 243; *Schenck v. Legh*, 9 Ves. 299; *Hallifax v. Wilson*, 16 Ves. 168; *Bouverie v. Bouverie*, 2 Ph. 349; *Cripps v. Wolcott*, 4 Mad. 11; *Jones v. Jones*, 13 Sim. 561; *Bright v. Rowe*, 3 My. & K. 816; *Parker v. Golding*, 13 Sim. 418; *Mailland v. Chalie*, 6 Mad. 243; *Ridgeway v. Ridgeway*, 15 Jur. 960; s. c. 4 Eng. Rep. 108, and *Casamajor v. Strobe*, 8 Jur. 14. The cases were all one way. It was most clear that these words must mean their having died before the shares became vested.

[SIR J. PARKER, V. C. The testator's attention was only drawn to the mother dying leaving children under twenty-one and unmarried; he did not anticipate, or did not provide for, the other event.]

Tarriano, for the trustees.

Russell, in reply, said that the cases cited were chiefly like *Hallifax v. Wilson*, all turning on the construction of the word "payable," in a similar gift over. The word "payable" was an ambiguous word; it was necessary to ascertain what particular meaning the testator at-

tached to it. If it were preceded by a clause making the legacy payable at twenty-one or marriage, that explained the meaning. The case of *Bright v. Rowe*, was a case upon the word "payable," but it was not there of doubtful meaning. The other side must show that becoming "entitled in possession" was an expression of doubtful meaning, and then that it was explained to mean vested only by the other parts of the will.

[SIR J. PARKER, V. C. From the clause it would seem as though the testator had left out of his imagination the possibility of any child attaining twenty-one before the death of the mother; but he assumed that the time at which they would attain that age would be after her death.]

SIR J. PARKER, V. C., said that his opinion in this case was, that the personal representatives of Mrs. Cockburn were entitled to one moiety of the fund, although she had not survived the tenant for life. His honor said that he thought the case was governed by the authorities cited. The general rule was, not to divest an interest vested, unless there was a clear direction to that effect in the will. There were many cases under wills, and also under settlements for the benefit of children, in which the court had applied this rule so as not to make the interests of the children depend on their surviving the tenant for life. In other cases the court had tried to construe the interests as vested at the particular ages at which the testator intended, and not to make the vesting depend on their surviving. There were cases before Sir W. Grant much stronger than those cited. Any one who reads *Powis v. Burdett*, 9 Ves. 428, must see that the circumstances were stronger in that case; the whole was governed by the direction there, "after the decease of the tenant for life, in case he should leave one or more child or children;" the difficulty was greatly increased by that. Lord Eldon in that case, referring to the cases which were cited here, said, "These cases, if they are to be shaken, must be shaken in the House of Lords." In the same judgment, speaking of a former case decided by him, he said that he had looked to see whether he could not put it upon the circumstance that there happened to be some children living; and then he said, "But if that circumstance had not occurred, the result of my opinion is, that I should have been called upon by preceding authorities to decide that case upon a larger principle; and I agree that it is mischievous to decide these cases upon small circumstances." His honor said that was a case of a settlement; but it appeared to him that these principles of construction applied to wills as well as settlements. That was shown, amongst others, by the case of *Maitland v. Chalie*, 6 Mad. 243, in which these principles were adopted by Sir John Leach; and also in *Casamajor v. Strode*, 8 Jur. 14. His honor, therefore, could not doubt that the construction adopted in settlements, where children were provided for, must apply to wills.

He considered that this case was governed by *Hallifax v. Wilson*. There it turned upon the meaning of the word "payable," in a direction, after the death of the testator's mother, to pay the trust moneys

Re Yates.

unto and among the testator's nephew and nieces, share and share alike, to be paid to them at their respective ages of twenty-one years, and the gift over was in case any of them died before their shares became payable. His honor said that he could not see that the words "entitled in possession" were more ambiguous than the word "payable." "Payable" was in itself a very clear expression, but it might be construed in two senses—one, the literal signification; the other, short of its full meaning, and more applicable to the person of the legatee. In *Hallifax v. Wilson* it was used in this latter sense, short of its full meaning. The words "entitled in possession" were open to the same observation. That expression was neither more nor less ambiguous than "payable;" it also was capable of two meanings—in one, it was used in the sense of being in the actual possession of the subject; in the other, in a subordinate sense, short of its full meaning. Following *Hallifax v. Wilson*, these words might here be used in the latter sense, short of their true meaning, having reference to the preceding gift, which the clause in which they occurred was intended to devest. The case of *Bright v. Rowe* had been referred to, and it appeared to his honor to be a valid authority, rather illustrating *Hallifax v. Wilson* than going against it. It must be observed, that "payable" in that case must mean with reference to the interest of the tenant for life, and not those who came after. If the fund in that case became payable before the children attained twenty-one or married, it was to be kept for the children; in case any died before it became payable, it was to go over. There the word "payable" could have only one meaning, with reference to the fund being set at liberty by the death of the tenant for life. It was impossible on that instrument to take the word as having two meanings.

His honor added, that it was a mistake to say that in these cases the court had too much regarded the intention of the testator, or made a will for him; all the court had done was to construe his meaning in a large sense. In this case it was clear, that, instead of altering the will, such a construction would carry out the testator's intention. Here there was a life estate in the daughter, and after her decease the fund was to be in trust for her children at twenty-one or marriage. The testator evidently intended to provide for the event of the children marrying or attaining twenty-one. He assumed that there would be nothing to prevent their taking the money at those times, except himself being still alive. The whole of the provisions in the will were on that principle. The testator said, "on the respective attainments of such children to the age of twenty-one years being sons, or on their respective attainments to that age, or day or days of marriage, which might first happen, being daughters." He then directed the interest of their respective portions to be applied for their maintenance, on the assumption that the children would be under age or unmarried at the death of the tenant for life. Then he said, "and in case any of the children of his daughter should die before being entitled in possession to his, her, or their shares under his will, he gave such share or shares over;" that is, if any of those children of whom he had been speaking should die, &c. This part of

The South Staffordshire Railway Co. v. Hall.

the will obviously referred to the case of children not having had any interest in the money at all—the case of their dying before they became entitled in possession. His honor thought that the representatives of Ellen were entitled to one moiety of the fund, and that in deciding thus he was not going beyond the authorities.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY v. HALL.

July 18, 1851.

Injunction—Legal Right acquired pending Injunction.

Pending an injunction, which was granted upon the authority of a case that was ultimately overruled, the defendant acquired a statutory right as against the plaintiff:—

Held, that upon dissolving the injunction, the court would not impose terms upon the defendant which would have the effect of depriving him of his right so acquired.

THIS was one of several suits which were commenced on the authority of Lord Cottenham's decision in the case of *The London and Northwestern Railway Company v. Smith*, 13 Jur. 417. The landowner having served a notice on the railway company under the Lands Clauses Consolidation Act, claiming 550*l.* as compensation, or requiring the company to summon a jury to assess the compensation, the company filed their bill, alleging that the landowner was not "injuriously affected" within the meaning of the 68th section of the Lands Clauses Consolidation Act, and praying an injunction, which, on the authority of *Smith's case*, was granted, restraining the defendant from taking any other proceedings under the act. This injunction was submitted to by the defendant, until Lord Chancellor Truro's decision in *Gatlke's case*, 15 Jur. 261; s. c. 3 Eng. Rep. 59, when it was moved on behalf of the defendant, before Lord Cranworth, V. C., that the injunction should be dissolved. Lord Cranworth, V. C., followed the decision of Lord Truro in the latter case, and dissolved the injunction. (The case is reported 15 Jur. 322; 3 Eng. Rep. 105.) This was a motion ostensibly to discharge the order dissolving the injunction, but, in effect, only to vary it, by imposing terms upon the defendant, so as to prevent the amount claimed as compensation being recovered as a *penalty* under the latter words of the 68th section of the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 18—"And unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of

The South Staffordshire Railway Co. v. Hall.

compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The company had not issued their warrant to summon a jury within the twenty-one days, but had obtained the injunction as above stated; but on the day upon which the injunction was dissolved they did issue their warrant to summon a jury.

Rolt and Speed, for the company. We submit that the company having been led into the mistake by *Smith's case*, they ought to be put in the same position as if they had issued their warrant for the jury upon the day on which they obtained their injunction. The defendant's notice of claim was given on the 12th December, 1850; the injunction was obtained *ex parte* on the 2d January, 1851, the last day for issuing the warrant; they were, therefore, led into the mistake of not issuing the warrant by the decision of the court; and we say that the court ought to shut out from its computation of the twenty-one days the entire interval during the continuance of the injunction. The company would then have issued their warrant on the twenty-first day after the notice; and we submit that the court ought to have dissolved the injunction on terms, it not having been obtained upon any misrepresentation of facts. We only want liberty to discuss before the jury, first, whether the lands are injuriously affected; and, secondly, what amount of damage the defendant has sustained. The defendant says, "If I prove that my land is injuriously affected, I am entitled to 550*l.* under the statute." The question therefore is, whether the defendant, under certain circumstances, is to be entitled as of course to one farthing or 550*l.* damages.

[LORD CHANCELLOR. Was any question of terms raised in the court below?]

This was answered in the negative.

[LORD CHANCELLOR. Then is it a matter of appeal at all? Is there any instance of the court imposing terms upon dissolving an injunction that ought not to have been granted?]

We only ask, that, the defendant undertaking to go before the jury as if the injunction had not been granted, the injunction may be dissolved.

[LORD CHANCELLOR. In effect, to restrain the defendant from bringing his action. At common law, a defendant must plead abatement within four days; but suppose the defendant comes here and obtains an injunction against the action proceeding, which injunction is dissolved after the expiration of the four days, he would not be allowed to plead abatement. The case of *Knight v. The Marquis of Waterford*, 11 Cl. & Fin. 653, seems very apposite to the present case. There, at the time the suit was commenced, there was no Statute of Limitations which interfered with the right of the plaintiff, and there was a decree made in his favor. The marquis then appealed to the House of Lords, and the House reversed the decision of the Equity Exchequer, but gave the plaintiff liberty to bring an action to establish his right, which was the mode he ought to have pursued in 1830, when he filed his bill. Between that time and the

Briggs v. Penny.

decision of the House of Lords two statutes of limitations had passed, the 2 and 3 Will. 4, c. 100, and 3 and 4 Will. 4, c. 27, which materially affected the right of the plaintiff, and he asked the House that he might be put in the same situation as if he had brought his action in 1830, instead of having filed his bill, and that the defendant might not be allowed to take advantage of those statutes; but the House of Lords said that they would do no such thing.]

James Parker and *Willcock* appeared for the defendant, but, without hearing them,

The LORD CHANCELLOR expressed his opinion, that, in the absence of any authority, where, upon dissolving an injunction which ought never to have been granted, the defendant had been put upon terms, he could not deprive the defendant of any right which had accrued to him during the continuance of that injunction; that the application to impose terms upon the defendant ought to have been made to the court below. His lordship also observed upon the length of time which the plaintiffs allowed to elapse between the order dissolving the injunction, which was dated the 22d March, and the present application.

Motion refused, with costs.

BRIGGS v. PENNY.¹

June 7, 9, and 10, and November 7, 1851.

Will — Trust — Precatory Words, "well knowing."

A testatrix gave various charitable and other legacies, and gave to S. P., whom she appointed sole executrix, 3000*l.*, and a like sum of 3000*l.*, in addition, for the trouble she would have in acting as executrix. She then made other bequests, and then gave all the rest, residue, and remainder of her personal estate to S. P., her executors, administrators, and assigns, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes":—

Held, affirming the decision below, that the executrix did not take the residue beneficially.

Words accompanying a bequest expressing confidence, belief, desire, or hope, as to the application of the bequest, will create a trust, when they exclude all discretion in the donee, the subject is certain, and the objects definite.

THE question in this appeal arose upon the construction of the residuary gift in the will of the Honorable Frances Harley, who by her will, dated the 11th May, 1835, after having given several charitable and other legacies, proceeded as follows:—"To Sarah Penny, of Great James street, Bedford row, 3000*l.*, and a like sum of 3000*l.*, in addition, for the trouble she will have in acting as my executrix;" and after giving various annuities and other legacies, the testatrix concluded as follows:—

¹ 16 Jur. 93.

Briggs v. Penny.

"And, lastly, as to all the rest, residue, and remainder of my personal estate and effects, subject to and chargeable with the aforesaid several legacies and annuities, save and except such of them as are of a charitable nature, which I exclusively charge upon such part of the said personal estate as by law I am empowered to charge therewith, and not out of any part of my lands, tenements, or hereditaments, I give and bequeathe the same unto the said Sarah Penny, her executors, administrators, and assigns, *well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes*; and I hereby appoint the said Sarah Penny sole executrix of this my last will and testament, revoking all former and other wills by me at any time heretofore made, and declaring this alone to form my last will and testament." The testatrix never formally declared her views and wishes, but there were various papers found, in the handwriting of the testatrix, expressive of her views and wishes, and containing directions for Miss Penny with regard to her property, many of which would have been void under the Mortmain Act; but these papers were not admitted to probate. They are, however, set out in the previous report of this case, 13 Jur. 905. The bill was filed by the representatives of the late Earl of Oxford, who was sole next of kin of the testatrix, against Miss Penny as executrix, claiming the undisposed-of residue. Knight Bruce (late Vice-Chancellor) held, upon the construction of the will, that Miss Penny did not take the residue beneficially. From that decision Miss Penny appealed.

The Solicitor-General, (Sir W. P. Wood,) *Malins*, and *Walford*, for the plaintiffs.

Bethell, *James Russell*, and *Hislop Clarke*, for the appellant, Miss Penny.

The Solicitor-General, in reply.

The arguments of counsel and the cases cited were the same as those used in the court below, and are fully stated at pp. 907, 908, of the previous report.

November 7. The LORD CHANCELLOR now delivered the following judgment:—This is an appeal from the decree made by Knight Bruce, V. C., on the hearing of the cause, declaring that Frances Harley, the testatrix in the pleadings mentioned, bequeathed the residue of her personal estate to the defendant, as a trustee, for some purpose or purposes which her will and codicils did not disclose, and directing an inquiry whether the views and wishes of the testatrix concerning the disposition of such residue were declared by her in any instrument, paper, or writing; and if the Master should find that they were not so declared, the decree directed the usual accounts to be taken, and the estate to be administered in the usual manner. The question arises upon the terms of the residuary bequest of the testatrix. [His lordship here read the clause bequeathing the residue,

Briggs v. Penny.

and continued:] The question involved in this case has very frequently occurred, and is the subject of very numerous decisions; and considering the infinitely various forms of expression, and the minute differences in them to which those principles had to be applied, it is not surprising that it should be difficult to reconcile them all one with the other. But I think the principles themselves are now sufficiently certain, and that the duty which remains consists in the application of them to the peculiarities of each case as it arises. I therefore think that it would be an unnecessary occupation of time to go through a long series of cases in which they have been recognized. In the case of *The Corporation of Gloucester v. Osborn*, in which I was of counsel, and which was argued a few months before I left the bar, in the House of Lords, those numerous decisions came under review, and they will be found collected in that case, as reported in 1 H. L. C. 272. I shall therefore content myself with stating the principles which I deduce from the present state of authority, and how I apply them to the words of the will in question, so as to lead me to the judgment which I have formed, referring to the judgment given in this case in the court below, in which I generally concur.

The question is, whether the words annexed to the residuary bequest which I have read amount to a trust, or only denote the motive or reason of the gift. I conceive the rule of construction to be, that words accompanying a gift or bequest, expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust, upon these conditions—first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced. With respect to the first of these conditions, I am of opinion that there is no doubt that the words “well knowing,” used in the present case, are equivalent to, if not synonymous with, the expression “in the fullest confidence,” and that they are, in my judgment, used in such a manner as to exclude all option or discretion. With regard to the second condition, no question exists. With reference to the third condition, it has been contended that the object is not certain; and it has been stated, and with truth, that vagueness in the object is regarded as evidence that no trust was intended to be created; and it has been, in effect, argued, and indeed with very great plausibility, that the words which are superadded to the bequest are merely expressive of the testatrix’s full conviction, from her reliance on the character of Miss Penny, that she would make as good use of what was given her as of her own property, and would, in fact, dispose of it in such a way as would further those objects which, as the intimate friend of the testatrix, she well knew that the testatrix was desirous of promoting. Specious, however, as this construction undoubtedly is, I am of opinion that it is not the true construction of these words. It is assuming the whole question to say that “views and wishes” are too vague to import a trust. The fact that the testatrix “well knew” or believed that Miss Penny would dispose of the property in

Briggs v. Penny.

a manner in accordance with the testatrix's views and wishes, of necessity implies that the testatrix assumed that such views and wishes were already, or would thereafter, either in writing or verbally, be made known. There is, therefore, nothing on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the court has held, that the uncertainty of the object has afforded evidence that no trust was intended.

But suppose that it cannot be found that the testatrix did, in fact, ever make known her views and wishes, or has made them known in a manner of which the court cannot take judicial notice: even then it is impossible to say that she never did express them in writing. She may have done so, and the writing may have been lost or destroyed, or be incapable of receiving judicial notice. But it is not necessary even to argue this. It is sufficient that the will distinctly indicates that Miss Harley intended to make them known, or had previously made them known, as otherwise the legatee could not do that which she "well knew" the legatee would do, namely, act in accordance with them. There is no real and substantial distinction between such a case and the case of a testator who gives all his property to A, on trust, but never declares that trust. In the latter case there is the fact that a trust nomination exists or was intended, but the objects are unknown. Here is the fact that views and wishes exist, and the bequest is made in confidence that they will be accomplished, but the objects are unknown. It is true, that possibly the objects included in such views and wishes might, if known, be too vague and indefinite to be enforced; but so might the objects of the trust nomination, if they were known. It is most important to observe, that vagueness in the object will unquestionably furnish reasons for holding that no trust was intended; yet this may be counterbalanced by other considerations, which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual. And it is not necessary, to exclude the legatee from a beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Now, this is precisely the case with the present bequest. I agree with the Vice-Chancellor in interpreting "views and wishes" to mean "designs and desires;" and the very expression of confidence that Miss Penny would make a good use, and dispose of the property in a manner in accordance with the testatrix's designs and desires or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or, in other words to the same import, upon trust. It seems to me to amount to a bequest upon trust; and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared, but still in such case it is clear a trust was intended, and that is sufficient to exclude the legatee from a beneficial interest.

Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the object of that trust, or though he declares the

Ex parte Loveday.

trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is no peculiar effect in the word "trust." Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. But in this case we are not left to spell out a trust from the residuary clause alone. The fact, that, besides a legacy of 3000*l.*, another legacy is expressly given to Miss Penny, "in addition, for the trouble she will have in acting as executrix," clearly shows that she was not intended to take the residue beneficially; because, if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all the bequests, there could be no object in taking out of that residue, of which she was to have the whole, 3000*l.* for her trouble. The legatee gained nothing by the legacy; but the fact of the legacy not only strongly confirms, but is only consistent with, the hypothesis that the whole residue was not to be taken beneficially. Further, this cannot be referable to the trouble she would have in the execution of the bequest in the will itself, or the proved codicils; for though the bequests are numerous, not one of them involves any amount of trouble; whereas the views and wishes of the testatrix, to which she alluded, might be such that the carrying *them* into effect might involve the executrix in very difficult trusts. Being clearly of opinion, upon these grounds, that a trust was intended, the question, whether the unproved papers may be looked at in order to prove the intention to create a trust, does not arise, or, at all events, it is unnecessary for me to consider it.

Appeal dismissed.

*Ex parte LOVEDAY.*¹

December 3 and 4, 1851, and January 15, 1852.

Lunatic — Costs of Inquisition on a successful Traverse.

A person found lunatic by inquisition may traverse as a matter of right.

On a successful traverse, the costs of the parties suing out the commission will not be allowed as a matter of course out of the property of the alleged lunatic.

On the contrary, unless a grant has actually been made under the prior inquisition, or unless there is property belonging to the alleged lunatic in the hands of the court, the court has no jurisdiction to allow such costs, either under the 6 Geo. 4, c. 53, or otherwise.

THE circumstances of this case sufficiently appear from Lord Cranworth's judgment.

Ex parte Loveday.

Rolt and *Terrell* supported the petition.

The Solicitor-General and *Amphlett*, contra.

Rolt replied.

January 15, 1852. LORD CRANWORTH, L. J., now delivered the judgment of the court. This petition, which was presented by John William Loveday, in respect of whom a commission of lunacy has issued, prays that that commission may be superseded, and that Charles Baker and George Loveday may be ordered to deliver up certain deeds belonging to the petitioner. The commission was issued at the instance of George Loveday against John William Loveday, the petitioner, who was under it declared a lunatic, and Baker was appointed committee of his estate; but no grant was made of the property of the lunatic or alleged lunatic. The inquisition and the finding of the jury under that commission was traversed, and, a second jury being impanelled, the result was a finding that John William Loveday was not at that time a lunatic. There is some difficulty about the expressions, but the result was to undo what had been done on the former inquiry. The consequence was this petition, praying that the commission might be superseded, and that Baker (the grant to whom had never been perfected) might deliver up all deeds and documents belonging to the alleged lunatic. The *supersedeas* is a matter of course; but John William Loveday has insisted that he has a right to be paid his costs of suing out the commission. Now, upon this claim there are two things to be considered: first, whether we have jurisdiction; and, secondly, whether, if it be within our power, the circumstances of this case would make it proper for us to make such an order. As to the second point, relating to the conduct of parties—the motives by which they were influenced in suing out the commission, and the manner in which they have proceeded in it—as we had no information on this point, we have taken an opportunity of communicating with the Lord Chancellor, and we are satisfied that, if we have jurisdiction to do so, this would be a proper case in which the petitioner should be allowed his costs. Now, it is clear that we have no jurisdiction whatever, except under the statute 6 Geo. 4, c. 53. That was decided by the case before Lord Loughborough. *Ex parte Ferne*, 5 Ves. 450, 832. When that case came before the Chancellor on the traverse of the inquisition, his lordship said that he was not, upon the evidence, dissatisfied with the finding; but the traverse was of right. And afterwards, when it came back, the petitioner having been found not lunatic, and the commission superseded, on the question of costs, (p. 833,) he asks, "Where is the fund to pay the costs? Where the commission is superseded there can be no fund. There is a step to be taken—possession to be taken of the property. The traverse stops that. . . . If I could act *cum imperio*, it is a very proper case, and the parties have shown themselves entitled to all the costs I can give them; but I have no jurisdiction." Now, that was a stronger case

Ex parte Loveday.

than the present, for the first jury had found the lady a lunatic; but here we do not exactly know whether the alleged lunatic was a lunatic or not. And in *Sherwood v. Sanderson*, 19 Ves. 280, Lord Eldon fully recognized the doctrine in *Ex parte Ferne*, although he gave the costs of the inquisition; but then he did not give them *simpliciter* by his authority in matters of lunacy, but because there was property belonging to the alleged lunatic in the Court of Chancery, over which his Lordship thought he had power. The jurisdiction in lunacy is to administer the property of the lunatic; but if that never gets into the hands of the court, it is clear that it never can administer it. The application for costs, therefore, must rest entirely on the statute 6 Geo. 4, c. 53. The title of that act is, "An Act for limiting the Time within which Inquisitions of Lunacy, Idiocy, and *Non Compos Mentis*, may be traversed, and for making other Regulations in the Proceedings pending a Traverse." If the provisions of the act be sufficiently extensive, I agree that the preliminary part of the statute is immaterial; but it is clear there is nothing either in the title or the preamble which can help us here. Then we come to the 4th section. See whether there is any provision there as to costs pending the traverse, that is, while it is uncertain whether the party is a lunatic or not. The 4th section is as follows:—"It shall be lawful for the Lord Chancellor, or other person intrusted as aforesaid, from time to time, after the return of any such inquisition as aforesaid, and notwithstanding any petition or order which may be depending relating to a traverse of such inquisition, to make such orders relative to the custody and commitment of the person or persons, and the commitment, management, and application of the estates and effects of any person or persons, who shall or may have been found lunatic, idiot, or of unsound mind, by any such inquisition or inquisitions as he or they shall think necessary or proper; and all acts, matters, and things which shall have been done by any person or persons appointed committee or committees of the persons or estates of such persons found or to be found lunatic, idiot, or of unsound mind as aforesaid, or by any other person or persons, shall be, and are hereby declared to be, as valid and effectual; and such committees, &c., as are hereby indemnified, in respect of such acts, matters, and things, from and against all actions and proceedings, &c., and all costs, &c., to be brought and recovered by the lunatic, &c., as fully and effectually as if such inquisition had not been traversable, but not further or otherwise." We think that this section does not give us any authority to make any order as to these points, and that on two grounds. We may reject the consideration of the title to the act, but there is the same meaning in the words of the section I have just read; and that provision only means that the court may proceed pending the traverse, and deal with the property during that interval on the authority of the inquisition, *non obstante* the traverse. That the provision in this section is limited to the interval, while the success of the proceedings on the traverse is still uncertain, is abundantly clear, when we consider what a contrary construction must necessarily lead to; for if this statute gives us authority to deal with the property of an alleged

Clements v. Bowes.

lunatic after a second inquisition (the first having been traversed) has found in favor of his sanity, it must give us authority to deal with his person also, notwithstanding the verdict of the second jury has found him to be perfectly sane. The authority is all given in one sentence — “relative to the custody and commitment of the person, and commitment, management, and application of the estates and effects.” Till what period of time is that jurisdiction meant to extend? Is it only until the finding on the second inquisition, or beyond that? If beyond, then it conveys an authority to deal with the person of a person erroneously alleged to be a lunatic, after the erroneousness of the allegation has been established; which is such a *reductio ad absurdum* as satisfies us that the authority is only intended to be given during the interval before the issue of the second inquisition. We cannot make an order which would only be a personal order, in a case where we have no jurisdiction over property. We might, it is urged, make the order for the delivery up of the documents to the petitioner, conditional upon his payment of these costs; but we are not authorized to make any such terms. The deeds belong to this gentleman; and, as he is not a lunatic, he is entitled to receive them. In fact, if we were to impose any such terms, the order would be nugatory; for an action of trover would lie, in which he would, without doubt, be entitled to the possession of them.

Order accordingly for the delivery up of the documents, without payment of any costs.

CLEMENTS v. BOWES.¹

January 14, 1852.

Public Company — Parties — Directors — Winding-up Act.

On demurrer to a bill filed by a shareholder in a projected company, on behalf of himself and all other shareholders except the defendants, who were called “the finance committee,” stating that he and other shareholders had paid their deposits, that the finance committee had the sole control, and that 17s. 6d. had been repaid on some of the shares, and praying an account and an apportionment of the surplus between the plaintiff and the other shareholders:—

Held, that no directors were necessary parties; that all the shareholders need not be parties; that those who had not received back the 17s. 6d. were not necessary parties; and that the plaintiffs were not bound to proceed under the Winding-up Act.

THE allegations in the bill in this case, and the substance of the demurrer, are fully stated in the judgment.

Malins and Miller, in support of the demurrer. The directors of this company ought to be made parties to the suit. It is true, that

¹ 16 Jur. 96.

Clements v. Bowes.

the bill, as now framed, does not mention them; but the court will not take the plaintiff's statement on such a subject, as there must be a body of directors, under the Joint-stock Companies Registration Act. It is besides obvious, that this finance committee must have been appointed by the directors. Besides which, this is a case for the Winding-up Act, and the plaintiff ought to have proceeded accordingly. This was decided in *Parbury v. Chadwick*, 12 Beav. 614; 14 Jur. 636, and *Deeks v. Stanhope*, 15 Jur. 618; s. c. 5 Eng. Rep. 97. The bill is also defective for want of parties, as this is, in effect, a suit for winding up the company, to which all the shareholders must be parties. *Hichens v. Congreve*, 4 Russ. 562; *Major v. Mallock*, 1 My. & C. 555; *Taylor v. Salmon*, 4 My. & C. 134; *Wallworth v. Holt*, Id. 619; *Apperley v. Page*, 10 Jur. 999; 11 Jur. 271; *Evans v. Stokes*, 1 Keen, 24; *Bainbridge v. Burton*, 2 Beav. 539. There may also be some shareholders who have not paid their deposits, and they ought to be represented. *Lund v. Blanshard*, 4 Hare, 9; *Richardson v. Hastings*, 7 Beav. 301; *Lovell v. Andrew*, 15 Sim. 581; 11 Jur. 835.

Willcock and *E. G. White*, in support of the bill, were not heard.

SIR R. T. KINDERSLEY, V. C. I think that this demurrer must be overruled. The demurrer is for want of equity generally, and also for want of parties. The bill is filed by Benjamin Clements, on behalf of himself and all the shareholders other than and except the defendants; and the defendants are certain shareholders in the company who appear to have been appointed a finance committee. The bill states the projection of the company and states the various circumstances antecedent to an application to parliament, and then it states that an act was applied for, on behalf of the projected company, and a sum of 26,250*l.* was deposited with the Accountant-General, in conformity with the standing orders, and that leave was given to bring in the bill; that the bill was afterwards thrown out in the House of Commons, and the scheme fell to the ground. Then it states that the defendants were appointed a finance committee of the proposed company, and all the deposits which were made in respect of shares were under the exclusive control and placed at the disposal of the defendants, who accepted and acted in the control and disposition thereof; and they were authorized and empowered to make out and settle and adjust the accounts, they being answerable and accountable to the shareholders of the said company; and the said defendants became and are now liable and accountable to all the shareholders for all receipts and payments made to, or by, or in the name of the said company; that is a distinct allegation that all the deposits of the shareholders were placed under the exclusive control of the defendants. Then the bill states the plaintiff's demand for a return of his whole deposit, for a correspondence is set out, in which the defendants offer to return the sum of 17*s.* 6*d.* per share; and it states that an account was rendered to him to show in what way the finance committee had dealt with the money placed in their hands. It also states that an action was brought by the plaintiff against the defendant W. G. Todd; and it

contains various other charges, and prays, not a dissolution and winding up of the partnership, and that the accounts may be then taken, but it prays that an account may be taken, by and under the direction of the court, of all moneys which may have been received by, or come under the control or disposition of, the defendants, or any or either of them, in respect of deposits paid upon shares applied for or agreed to be taken in the said projected company, and an account of the capital of the said company; and also an account of the payments, costs, and expenses properly made and incurred or sustained by the defendants in the management of the affairs of the said projected company, and of the residue or surplus remaining, after allowing such payments, costs, charges, and expenses, and that such balance or surplus may be apportioned to the shares in respect of which the deposits were so paid; and that the amount due to the plaintiff and all other the shareholders on behalf of whom he sues respectively, after giving credit for the amounts already received by them respectively, (including the sum of 398*l.* 2*s.* 6*d.*, for which the plaintiff hereby consents to give credit,) may be paid to the plaintiff and such other shareholders as aforesaid, by the defendants; and that, for the purposes aforesaid, all proper accounts may be taken, and all proper directions may be given; and that the other shareholders in whose behalf the plaintiff sues may be ascertained.

Now, the bill merely asks that the defendants, who are allowed to have received all the deposits in respect of the shares, may account for what they have received; and that after applying such moneys in satisfaction of all payments, costs, and expenses, the surplus may be divided, not among any given class of the shareholders, but generally amongst them all, including not only those who have received the 17*s.* 6*d.*, but the rest also. The plaintiff states, that in respect of 115 of his shares the 17*s.* 6*d.* had been received, but as to the other shares he had refused to receive the money. The demurrer is supported on these grounds: first, that a sufficient account had been already rendered; and then that the plaintiff ought not to be allowed to sue the defendants solely in respect of that matter. Now, whether the account was satisfactory or not, the rendering of the account could not prevent a person from filing a bill to have an account taken under the authority of the court. It is not sufficient that an account should be rendered upon the representation of the defendants, but the plaintiff has a right to have an account taken under the machinery which this court provides; therefore rendering an account is not sufficient.

The second ground of demurrer is, that the plaintiff ought to proceed under the Winding-up Act, and that the legislature having provided the method of winding up and dealing with the affairs of an inchoate railway company of this kind, as well as others, this court ought to refuse to a party the right of coming here to have the account taken. The case of *Parbury v. Chadwick* was cited, in which the late Master of the Rolls stayed proceedings in a suit on motion, where a bill had been filed after an order made for winding up a company, and where, if I apprehend rightly the nature of the suit, it sought relief of the same nature as that provided by the Winding-up Act:

at all events, the bill in that case was filed after the order for winding up had been obtained. Without stating whether, if there had been an existing order to wind up, and then this bill had been filed, I should have considered that a sufficient ground for allowing the demurrer, it appears to me that it cannot be a good ground of demurrer to say you shall not have your remedy by bill, because you may apply for a winding-up order; and it may be the court will grant it. I am far from taking it for granted that the court would in this case grant such an order. I am not satisfied about that, though I do not say it would not grant it. I express no opinion upon that act from any experience in these matters. I have been led to this conclusion, that great as is the difficulty in proceeding under a suit for this purpose, the mischief of applying the Winding-up Act to such a case is greater. But the real question is, whether the legislature, in providing a remedy under this act, has excluded the remedy under a bill for making certain individuals, who have received money in respect of a number of shares, account for the money, after allowing for all costs, charges, and expenses, and for distributing such surplus amongst all the shareholders *pro rata*, according to the number of their shares. To oust the jurisdiction of the court of chancery in such a case, the legislature should have so declared it. It is plain, where the court of equity has jurisdiction in such a case, an act giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court. It appears to me, therefore, that this second ground of demurrer is not sustainable.

As to the want of parties, the demurrer itself represents two difficulties as existing on the bill with respect to parties, and is framed in this way—"And for further cause of demurrer, the defendants show that it appears by the plaintiff's own showing, that the scrip or shareholders in the bill mentioned who had not received the sum of 17s. 6d. per share on their respective shares or scrip in the said bill mentioned, and also the several share or scripholders of the said projected company, and the persons who entered into a subscription for the purpose of forming the said company other than those defendants, are necessary parties to the said bill; and yet the plaintiff hath not made such several persons, or any or either of them, parties to the bill." Now, the persons here represented as necessary parties are, first, those shareholders who had not received back the 17s. 6d. per share, the plaintiff being one who has not received back that sum in respect of some of his shares, though he did with respect to others which he had pledged. The demurrer was, in fact, intended to include all the shareholders. As to those who did not receive that sum, the question comes to this, because the principle is clear. The question is, whether that class of shareholders who did not receive the money have a different interest from those who did receive back the amount—that is, the same interest in the relief asked by the bill. Now, the relief is for the common interest of all, if for any. I am far from thinking the bill is for the interest of these parties; but if the plaintiff chooses to enter into such a speculation as the filing of this bill, he has a right to do so.

Clements v. Bowes.

The relief asked is, to make five individuals, who are alleged to have received all the moneys by way of deposit, account for what they have received, and that whatever balance is found to be in their possession, after payment of the proper expenses, may be divided, not amongst any class, but amongst all *pro rata* — that is, the 17s. 6d. to those who have not received it, and then dividing the rest amongst them all. I cannot see that there is any difference of interest between the one class or the other, as far as the relief sought by the bill, which is the real question. If a person files a bill for himself and others, there may be some who would not like the bill to be filed; but if on the face of the transaction it be for the common interest of all, it is no more for the interest of one than the other. It is clearly for the interest of all that the relief here asked should be granted; and it appears to me there is no ground for saying any particular class should be represented by the members of that particular class. Then the other class mentioned is the whole of the shareholders. The answer to that is, the title states, and it is therefore admitted by the demurrer, that the whole of the shareholders, being upwards of 200, are so numerous that it is impossible to make them all parties; and as to that point in the case, it is clear upon all the authorities that the plaintiff is not obliged to make them all parties.

Now, these are the classes of shareholders who, on the face of the demurrer itself, are said to be necessary parties; but it is also urged at the bar, that there is another class of persons, not suggested by the demurrer, who also ought to be made parties, namely, those who stood in the position of managers, and carried on the affairs of the concern before the finance committee were appointed; but on the face of the bill there is nothing to show when they were appointed, or why they were appointed the finance committee; and, with one single exception, there is no allusion in the bill to any other body of directors. No doubt it may be supposed there were other directors; but the bill being silent as to such other directors, and no mention being made of any other body of directors other than the finance committee, how am I to say that there were other persons acting as directors? The exception I allude to is the expression contained in a letter which was addressed to the plaintiff, and in which mention is made that the directors would do so and so; but that is not an allegation of the fact that there were other directors; the bill does not allege that there were, but these gentlemen, in writing an answer, say that the directors may do so and so. Can I, then, say, without any further evidence, and taking the bill, as I must do, to be true, that there was a body of directors different from the finance committee? Might not the writer of that letter have meant the finance committee when he used the term "directors"? No doubt advantage may be taken of this fact in another mode, but I cannot assume that there was a body of directors who ought to have been made parties to the suit. But suppose there were such a body of directors, what interest have they different from the other shareholders in respect of what was asked by this bill? If this bill sought to impeach the management of the directors in imputing to them any improper con-

The Attorney-General v. The Birmingham and Oxford Junction Railway Co., &c.

duct, and to have the whole dealings and transactions of the concern wound up, then it might be necessary to have them parties; but that is not so, and I must assume all that it stated here to be true, whether the truth has been cut out of the bill by the amendments, as suggested by counsel, or not; and, as regards the relief asked here, there is nothing to show that there is any ground for supposing such directors would have a different interest from the shareholders generally. I have now considered all the different grounds raised in support of the demurrer, and my opinion is, that the demurrer must be overruled. It is unnecessary to say that I do not express any opinion about the amendments to the bill. That is not my concern.

THE ATTORNEY-GENERAL v. THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY, THE GREAT WESTERN RAILWAY COMPANY, and THE BIRMINGHAM, WOLVERHAMPTON, AND DUDLEY RAILWAY COMPANY.¹

July 12, 16, and 17, 1851.

Attorney-General — Railway Company — Injunction — Completion of whole Line.

Where a railway company was authorized to make a direct line of railway, with a branch railway, and were about to complete and open the direct line, but had abandoned the branch line, the Attorney-General has no right to file an information to restrain the opening of the direct line, as a means of compelling the completion of the branch line, alleging that the abandonment of the branch line was an injury to the public.

THIS was an appeal from an order of Sir Knight Bruce, (late Vice-Chancellor,) allowing the demurrer of the defendants. The case is reported 15 Jur. 1024; s. c. 7 Eng. Rep. 283. The information was filed at the relation of several inhabitants of Stratford-upon-Avon, stating the several acts of parliament whereby the above companies were incorporated, in each of which acts, as well in those for making the diverging lines, as in that for making the direct line from Birmingham to Oxford, it was stated, in the usual terms, that the line of railway would be of great public advantage and utility. It alleged that the main line, the Birmingham and Oxford, was nearly completed, but that the defendants had abandoned the idea of making the diverging line from Tinwood Green to Stratford-upon-Avon: that they had not served any notices to treat upon the landowners whose lands would be required for the making of that line, and that their powers for taking the land would expire on the 3d August, 1851: that the abandonment of this diverging line would be a great injury to the public; and that the defendants had been applied to, to complete this line, but that they had taken no steps towards doing so: and it prayed that it might be declared that the Birmingham and

¹ 16 Jur. 113.

The Attorney-General v. The Birmingham and Oxford Junction Railway Co., &c.

Oxford Junction Railway Company were bound to construct the whole of the lines of railway which by their acts they were authorized and empowered to construct, and particularly the diverging line of railway from Tinwood Green to Stratford-upon-Avon; and that they were bound to open the whole of the lines for public traffic simultaneously: and it prayed an injunction against the companies to restrain them from proceeding with the construction of the Oxford and Birmingham line without commencing and proceeding with the line from Tinwood Green to Stratford-upon-Avon, and from opening the Oxford and Birmingham for traffic until the Stratford line should be constructed and ready to be opened for traffic, or until the Birmingham and Oxford Company should have given notice to the landowners on the Stratford line of their intention to treat for and purchase lands for the purpose. The defendants filed a general demurrer for want of equity, which the Vice-Chancellor allowed. The Attorney-General now appealed from that decision.

Bacon and *W. T. S. Daniell*, for the appeal. The injunction is asked in this case only as a means of compelling the companies to make the whole line: it cannot be denied that the abandonment of this diverging line would be a great public injury, for the companies themselves have stated that the making of it would be a great public advantage: the Attorney-General, therefore, as representing the public, has a *locus standi* to ask the assistance of the court; and if this demurrer be allowed, this proposition will be established, that there may be a wrong without a remedy. Lord Eldon has, in *Agar v. The Regent's Canal Company*, referred to in *The Mayor, &c. of King's Lynn v. Pemberton*, 1 Swanst. 250, laid down this doctrine, that if public companies come to parliament and ask for its sanction, and for powers to perform the proposed undertaking, the company is bound to perform it in whole, and any landowner who could show that the company was unable to complete the whole, or had abandoned a part, might come to the court for an injunction to restrain the company from taking his lands. So, in *Blakemore v. The Glamorgan-shire Canal Navigation Company*, 1 My. & K. 162, Lord Brougham said, "Such acts of parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else: that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals." See also *Regina v. The Eastern Counties Railway Company*, 10 Ad. and El. 546. Had a shareholder filed a bill in the present case, he would have been met by the case of *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 14 Jur. 494; 2 Mac. & G. 146, for there has been *acquiescence* in this case. The present information is right, therefore, in form. It is quite clear that the abandonment of this line by the companies is illegal. A

The Attorney-General v. The Birmingham and Oxford Junction Railway Co., &c.

company cannot, *mero motu*, abandon any portion of their line, otherwise the Railways Abandonment Act, 13 & 14 Vict. c. 83, would have been unnecessary. [They referred to the preamble of that act, and the following sections—4, 5, 6, 8, 12, 14, 15, 16, and 28.]

Bethell, Rolt, and G. L. Russell, in support of the demurrer. This is a mode of proceeding entirely without precedent. The Attorney-General is asking, not that we may be restrained from committing a wrong, but to restrain us from doing what we have a right to do. The other side admit that the only grounds upon which the Attorney-General can come into court are, public mischief or charity; and they say that the abandoning a portion of the undertaking is a public mischief; that the act of parliament empowering the companies to make the lines of railway is a contract with the public; and that the Attorney-General has a right to enforce this contract with the public. The Court of Queen's Bench is the only jurisdiction in the kingdom by which to enforce a public duty; but the Court of Chancery is not even asked by this information to compel the performance of this duty to the public—it only asks that we may be restrained from doing what, the argument of the other side says, we are bound to perform. We could understand this jurisdiction if it was to be ancillary to a court of law, but it is not, for it is simply prohibitory. It is quite clear that the Attorney-General has not the general authority which is contended for; for if that had been so, the particular provisions contained in the 17th section of the 7 and 8 Vict. c. 85, authorizing the Attorney-General, under the certificate of the Board of Trade, to proceed by information against the company in certain cases, would have been unnecessary. In the present case the Attorney-General has been put in motion by the inhabitants of a particular district, Stratford-upon-Avon; and he stands in a false position, for while he makes this application on the ground of an injury to a particular portion of the public, he asks that which, if granted, would be an injury to the general public. But, in truth, the Attorney-General has no *locus standi* here except in a case of nuisance. In *Mozley v. Alston*, 1 Ph. 790, an attempt was made to induce the court to interfere by injunction to restrain the directors from acting as such, alleging that the act of parliament had not been followed in the election of directors, there being then more directors than there ought to have been: the court below overruled a demurrer to the bill for want of equity, but Lord Cottenham allowed the demurrer. The shareholders in these companies would have had an equity to have filed a bill; and had they come in time they would have obtained an injunction. *Cohen v. Wilkinson*, 14 Jur. 491; 1 Mac. & G. 481; *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 14 Jur. 494; 2 Mac. & G. 146. [They also cited *The York Buildings case*, 2 Atk. 56; *Natusch v. Irving*, App. to Gow on Part. 398; and *Brown v. The Monmouthshire Railway Company*, 15 Jur. 475; s. c. 4 Eng. Rep. 113.

Bacon, in reply.

The Attorney-General v. The Birmingham and Oxford Junction Railway Co., &c.

LORD CHANCELLOR. Mr. Bacon, I wish you to apply yourself to this question — whether this is not substantially an information in the nature of a bill for specific performance, for something, the not doing of which does not amount to a public nuisance.

Bacon. There is nothing fatal in the words “specific performance,” as occurring in an information, for they often occur in charity cases; but, in truth, these words do not occur in the information, and they only occur in the argument of this case as the means of preventing a wrong. If I satisfy the court that a wrong will be committed unless the companies complete the entire undertakings, the court will endeavor to prevent the wrong in the only mode in which it can act. This is nothing more than the common equity, where an action at law is commenced, and then a bill is filed to restrain the action until discovery be given. The effect of granting the injunction asked by this information would be just the same as if it was the practice of this court to grant mandatory injunctions as well as prohibitory injunctions.

[LORD CHANCELLOR. The other side say their powers do not exist, from want of time, their powers expiring on the 3rd August.]

The information was filed on the 2nd June; therefore from that time they might have served their notices, &c.; but even if they have not time, the injunction will be the means of obliging them to go to parliament next session for fresh powers. This difficulty arises from their own wrongful acts, and they cannot make use of that as an argument against us. It is no argument to say that there is no case which has decided the right of the Attorney-General to file an information in such a case as the present. In *Walworth v. Holt*, 4 My. & C. 635, Lord Cottenham said, “I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy.” In the cases of *The Attorney-General v. The London and Southampton Railway Company*, 1 Railw. Cas. 283, and *The Attorney-General v. The Manchester and Leeds Railway Company*, Id. 450, the court granted the injunction solely upon the ground of contract.

[LORD CHANCELLOR. That was an injunction against the company doing what they had no right to do — namely, cutting through a turnpike-road before they had made a proper bridge. Here the injunction is asked against the company doing what they have a right to do.]

Brown v. The Monmouthshire Railway and Canal Company was the case of a dispute between a shareholder and the company, and the allegation of public wrong did not lie in his mouth, and could not be attended to by the court.

LORD CHANCELLOR. The equity which is stated upon this information is an equity supposed to be founded upon the breach of a duty imposed upon these companies by an act of parliament; and

Watts v. Symes.

the question is, whether the fact of the parties failing in the performance of this duty gives the Attorney-General a power to come and ask that the companies may be restrained from doing something that they have the power of doing, until they perform that which he says it is their duty to do. It strikes me that the law does not give him any such authority; he has the power to come here and restrain public companies from doing an act which they are not authorized to do, where it interferes with the rights of the public; but it is a very different thing to say, that where a work is expressly authorized by act of parliament to be done, he may come here to restrain the doing of that work until the company shall perform some other work. I have attended to all the cases that have been cited, and they all seem to fall within well-recognized principles — that is to say, that where acts are being done injurious to the public interests, inasmuch as the public interests might otherwise be altogether neglected, the Attorney-General has in such a case, not in a case of private injury, authority to represent the public. The several cases cited seem to fall within that principle; they were cases where the companies had no legal right to do the acts complained of, or were only authorized to do those acts upon condition of previously doing some other act, the not doing which was a public inconvenience. This is the short ground upon which I allow the demurrer; but I will state more at length my reasons on some future occasion.

WATTS v. SYMES.¹

December 26, 1851.

Mortgagor and Mortgagee — Transfer of Mortgage — Tacking.

mortgaged an estate X to B for 200*l.*, and an estate Y to B for 1200*l.* This latter mortgage was transferred to a trustee for C. Then A made a further charge of 400*l.* upon both X and Y in favor of B; and afterwards D contracted to purchase Y of A for 1500*l.* and to have the benefit of the mortgage to C in the mean time, paying her off with 1200*l.*, part of the 1500*l.*, "in discharge of her said mortgage," but stipulating to have the full benefit of her mortgage security. On a bill filed by A against B and D for payment or foreclosure:—

Held, reversing the decree below upon both points,

First, that the 1200*l.* debt was not so extinguished by the payment by D to C as to deprive D of his priority on the estate Y.

Secondly, that D could not redeem B's interest in the estate Y on payment of 400*l.* only, but must pay the debt of 200*l.* as well.

Holmes v. Turner and *Sneathman v. Bray* overruled.

THE bill stated an indenture dated the 28th September, 1843, by which the defendant Symes conveyed to the plaintiffs, T. and R. Watts, certain freehold and leasehold premises by way of mortgage, for securing to them the repayment of 200*l.* and interest. The in-

¹ 16 Jur. 114. See the case in the court below, reported 18 Jur. 205.

strument next in order of date was an indenture dated the 27th November, 1844, referred to, but not expressly set out, in the bill, by which a mortgage of certain reversionary interests in the residuary estate of Mrs. Pidsley, originally made by the defendant Symes some time previously for securing 1200*l.* and interest to T. and R. Watts, was transferred to R. Watts alone, as a trustee for Mary Severne, who advanced the 1200*l.* to T. and R. Watts, taking a transfer in the usual way. The bill then stated an indenture dated the 27th May, 1845, being a further charge in favor of the plaintiffs of 400*l.* additional on the premises comprised in the indenture of the 28th September, 1843; and by which indenture also the same sum of 400*l.* was further secured on the said reversionary interest on Mrs. Pidsley's estate, subject to Mary Severne's mortgage. The bill then alleged that Symes had sold all his right and interest in Mrs. Pidsley's estate to Tanner, on the following terms:— It appeared that Tanner had contracted with Symes to purchase all his interest at 1500*l.*, out of which he was to pay off the 1200*l.* to Mary Severne, and that he did pay off the 1200*l.* accordingly out of his own moneys; Symes, the mortgagor, signing the following memorandum, dated the 30th July, 1846:—“ I hereby acknowledge that George Tanner, of &c., has agreed to purchase of me, and I have agreed to sell to him, all my reversionary interest, &c. in the residuary estate of Mrs. Pidsley, deceased, at the price of 1500*l.*; and I further acknowledge and declare *that the said George Tanner has, at my request, paid to Mrs. Mary Severne, the mortgagee of my said reversionary interest, the sum of 1200*l.*, in discharge of her said mortgage*, out of the said purchase-money of 1500*l.*: and I agree to execute, and that all parties interested in my said reversionary property shall join in executing, on request, a proper conveyance or assignment of the said reversionary interest unto the said George Tanner, his executors, administrators, and assigns; and, *until such assignment can be duly executed, the said George Tanner, his executors, administrators, and assigns, shall stand in the said Mary Severne's place and stead as mortgagee thereof, and have the full benefit of her mortgage security.*” The agreement for purchase between Symes and Tanner still remained unperformed: no regular assignment had ever been executed by Mary Severne to Tanner of her mortgage interest, although she had been requested to execute such an assignment. The plaintiffs contended that the payment by Tanner to Mary Severne operated as an extinguishment of the debt; and of that opinion was the Vice-Chancellor in the court below, decreeing that the plaintiffs stood as the first incumbrancers on the reversionary interest. The defendant Tanner then contended that he ought to be allowed to redeem the property comprised in the indenture of the 27th May, 1845, namely, all the freeholds, leaseholds, and reversionary interest, on payment of 400*l.* only, and that the plaintiffs ought not to be permitted to tack the 200*l.* to that debt: and the Vice-Chancellor decreed accordingly. The plaintiffs, therefore, were successful in the court below as to the first part of the decree, and the defendants on the latter part. No appeal was made by the defendants against the first part of the decree, which was adverse to

Watts v. Symes.

them ; but when the plaintiffs brought the present petition against so much as was adverse to them, their Lordships immediately directed the attention of the appellants' counsel to the first part, and reversed it without calling on the counsel for the respondents. The appellants' counsel were then proceeding to argue the point on which they had appealed, but their Lordships stopped them, and called on the counsel for the respondents to support this part of the decree of the Vice-Chancellor.

Stuart and Dickinson, for the respondents, accordingly urged the terms of the contract, by which they contended, it was clear the security for the payment of the 400*l.* was to be distinct from the security for the 200*l.*

Knight Bruce, L. J. It is clear, on general principles, that if A mortgage to B an estate X, and then an estate Y, he must redeem both or neither. The particular instrument in this case does not appear to exclude that general principle. This is a further charge on the freehold and leasehold, and a charge on the residuary personal estate.

Dickinson. The trusts in the power of sale are express to pay the surplus moneys to the mortgagor.

Knight Bruce, L. J. Then do you argue that if he exercised the power of sale, he could be compelled to pay the surplus, if there were a surplus, to the mortgagor, though the mortgagor owed him 200*l.* on another transaction? It is a clear case of set-off or retainer, and it would be a subversion of all equity and justice if that were not held to be so.

Dickinson referred to the reasoning of the Master of the Rolls in *Jones v. Smith*, 2 Ves. Jun. 372, which was not interfered with by the reversal of that case in Dom. Proc. He also cited *Holmes v. Turner*, 7 Hare, 367, note, and *Smeathman v. Bray*, 15 Jur. 1051 ; s. c. *ante*, 46.

Shapter, (who was with *Rolt*), for the appellants, explained that in the latter case Sir G. Turner, V. C., had relied entirely upon *Holmes v. Turner*, and that in *Holmes v. Turner* he himself had obtained this part of the order by an argument which seemed, even at the time of uttering it, to be wholly fallacious, and seemed so still, though it gained a too ready acquiescence at the time. And of that opinion was,

Knight Bruce, L. J., who observed to the respondents that they would have their 1200*l.* as a prior charge, but if they wished to have any thing to do with the property beyond that, they must pay for it.

Lord Cranworth, L. J., in assenting, said — You must put the whole together ; if you take to the property you must take to it subject

 Conway's Case.

to the whole 1800*l.*, 1200*l.* of which is your own. I have looked carefully into the draft of the second mortgage, and there is nothing special in it.

KNIGHT BRUCE, L. J. Each party will bear his own costs of the appeal, to be calculated separately.

Teed appeared for Symes ; and

Martindale for Symes's assignee in bankruptcy.

Re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849;
 Re THE BRIGHTON, LEWES, AND TONBRIDGE WELLS DIRECT RAIL-
 WAY COMPANY ; CONWAY'S CASE.¹

December 19, 1851.

Contributory — Upfill's Case.

A member of the provisional committee of an association to form a railway company which failed applied by letter, begging that fifty shares might be allotted to him. The shares were not allotted. He took no part in any of the proceedings, nor attended any of the meetings : —

Held, that he was not a contributory, the circumstances being in these respects different from *Upfill's case*.

THIS was a motion, on behalf of the official manager engaged in winding up the affairs of the above-named company, that an order of the Master, directing that the name of Seymour Conway should be struck out of the list, might be discharged. The facts of the case will appear sufficiently from the judgment.

Terrell, for the official manager, argued that Mr. Conway's name should be placed on the list of contributories, on the authority of *Upfill's case*, 2 H. L. C. 674 ; s. c. 1 Eng. Rep. 13.

W. W. Cooper, *contra*, contended that the present was different from *Upfill's case*, because here there was no allotment of shares, nor any acceptance of them, except conditionally on their being allotted. Conway's letter of the 14th October said — "I shall be obliged if you will allot," &c. To this letter he had received no answer. Moreover, Conway's name had been struck out of the prospectus, and he never took part in any of the proceedings of the association. He cited *Carmichael's case*, 17 Sim. 163 ; s. c. 1 Eng. Rep. 66 ; *Onion's case*, 1 Sim. N. S. 394 ; s. c. 7 Eng. Rep. 64 ; *Carrick's case*, Id. 505 ; s. c. 5 Eng. Rep. 114 ; and *Barber's case*, 15 Jur. 51 ; s. c. 1 Eng. Rep. 190.

Terrell, in reply.

¹ 16 Jur. 120.

Conway's Case.

SIR J. PARKER, V. C., said:—In this case the Master has made an order directing the name of Mr. Seymour Conway to be struck out of the list of contributories to the company. The official manager now moves that this order may be discharged. Previously to October, 1845, Conway applied by letter for shares in the company, and that he might be placed upon the provisional committee. On the 10th October, 1845, the provisional committee or the managing committee passed a resolution in these words:—"That the number of shares offered to each provisional committee-man should be fifty, and that a letter should be sent to each gentleman, requesting an answer on or before the 15th October, 1845, stating what number, if any, he is inclined to take." It appears that this notice, with a letter from the secretary, was sent in pursuance of this resolution. There is no evidence what were the contents of that letter. I presume it must have been a letter communicating the notice; and Conway, in his affidavit, states that the qualification of a member of the provisional committee was the holding of fifty shares. On the 14th October, Conway writes to the secretary of the company thus:—"In answer to yours of yesterday, I beg to say that I have made application for fifty shares, and, as a member of the provisional committee, I shall be obliged if you will allot them to me." It was said that this case is governed by *Upfill's* case in the House of Lords, which is, no doubt, a decision binding on this court. Looking at the circumstances of the present case, so far as I have now stated them, I find a plain distinction between the two cases. In *Upfill's* case there was an apportionment or allotment of shares—for the two expressions were considered the same. *Upfill* was a member of the provisional committee, and had accepted the shares allotted to him. In the present case there has been no apportionment or allotment of shares. A resolution was passed, that the number of shares to be offered should be fifty to each provisional committee-man, and a letter was to be written, requesting an answer, stating the number that each was inclined to take; and the allotment was not to take place, if at all, till the answer was received. Conway's letter contains a request that fifty shares might be allotted to him—that is to say, when an allotment of shares should take place. In *Upfill's* case there was an actual allotment of shares. Here there is an offer of shares to be—but not yet—allotted; and to bring the case within *Upfill's*, I consider it incumbent on the official manager to show that the offer was made to the contributory, and was followed subsequently by an allotment of shares. This view of *Upfill's* case is in accordance with the judgment in *Barber's* case, referred to in the course of the argument. How does the alleged allotment stand upon the evidence? This list, which includes Conway's name, was made out on the affidavit of Nalder, the secretary, in which he says that all the letters of allotment, as to the first allotment of shares, were issued before the letters of the second allotment; and then he says, "To the best of my recollection and belief, the first allotment was posted on or before the 20th October, 1845, and that no part of the second allotment was posted until after that day." This is an extremely loose

Conway's Case.

statement: it contains no reference to books, or any record, kept by anybody on behalf the company, of what had been done. There is no particular statement as to any letter sent to Conway, and it does not state how the letters posted were addressed. Finding that the Master put on the list all the names of provisional committeemen to whom letters were addressed, Conway moved to take off his name, on these grounds—referring to his letter of the 14th October, he says, “I say that the said secretary did not, nor did any other person, reply to the said letter, and I positively say that I did not receive any letter or communication on the subject, either assenting to my application or declining the same, or allotting any shares to me in the said company, or otherwise howsoever; and I therefore concluded that my said application was not granted, and that no shares were allotted to me, and that my name was not placed on the provisional committee, and I did not further interfere therein. And I further say that I did not pay any deposit or call or other payment in respect of any shares in the said company, or otherwise howsoever; and that I have not signed or executed any agreement or deed relating to the said company.” This affidavit of Conway in distinct terms denies that any allotment was ever made or communicated to him. That puts the official manager upon proof of the allotment having been actually made. The proof which he tenders is the *vivâ voce* examination of Nalder, in which he says, “I received a letter of application from Mr. Conway for the shares, and in reply sent him the usual letter of allotment; and a letter was received from him stating his readiness to accept those shares.” That must be a mistake, or there must have been a letter written to Conway in answer to his letter of the 14th October. The letter which was first sent to him cannot have been the usual letter of allotment. We have not this letter, but we have Conway’s answer. In a subsequent part of the *vivâ voce* statement, the secretary says that he believes a letter of allotment was sent to Mr. Conway, because he says he sent letters to every one whose name is in the list. This is the only evidence of the letter having been sent. The only record of these proceedings is the prospectus—a document a good deal used, in which a great number of names appear to have been struck out. Conway’s name appears to have been struck out, amongst others, and then a finger seems to have been drawn through the stroke across the name, to prevent it from being so erased. This is the only record of this important transaction. The secretary says, “I believe the names struck out to have been by order of the directors, but Conway’s was not struck out.” Perhaps it was not; for before the ink was dry, there does appear to have been some alteration in the intention. In answer to the question as to whether he sent any letter of the kind described to Conway, the secretary says, “I have no doubt I did, for I sent letters to every one whose names are in this list.” Again: he is asked, “Is that a copy of the letter written by you to Mr. Conway?” He says, “It is.” “Did you inclose in that letter the letter of allotment?” “I did.” The secretary tries to prove that the letter was sent, and to evidence this by the copy of it. That which was produced as the

Ex parte Bryan's Trust.

copy is a blank form of a letter of allotment, printed, having the date "Dec. 17, 1845;" that date had been struck out, and "Nov. 17" was inserted in manuscript in its place, and the blanks are filled up, not in reference to Conway, but to some other person, who is to have, not fifty, but sixty shares. There does not seem to have been any duplicate kept of any letter sent to Conway, and there is in no book or record any thing to show what was the address of the letter as posted to Conway. Nothing can be more loose than this. The Master, upon this evidence, appears to have come to the conclusion, and I think rightly, that the official manager had failed in proving any allotment of shares to Conway, or any communication to him subsequently to October, 1845. What is Conway's position? He appears to have been a member of the provisional committee, who applies for shares, and says he will accept them if allotted, but to whom no shares were ever allotted. It is not alleged that Conway took part in any proceedings of the committee, or attended any of the meetings. As the law now stands, I think that Conway was not a contributory, and that his name was properly struck out of the list. The motion must be refused, with costs, to be paid by the official manager.

Ex parte BRYAN'S TRUST.¹

November 4, 1851.

Will — Construction — Persona designata — Second Husband.

A testatrix gave the interest of certain money in the funds to her daughter Mary for life, and after her decease the capital to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her daughter Mary. One of the daughters married a second husband, after the death of the testatrix, who was living at the death of the tenant for life: —

Held, that the testatrix meant to designate the particular husbands living at the time she made her will, and that the second husband was not entitled to a share of the trust fund.

THIS petition was presented by W. Darnborough, and it stated that Ann Bryan, by her will, dated the 16th of May, 1808, after giving various legacies, continued in the following words: "I will and direct that the interest arising from the stock remaining in my name in the Bank of England, be received and paid half-yearly to my daughter Mary, the wife of William Dudley, during her life and for her own use, by my executor, his heirs or assigns, and that her receipt only for the same be his or their discharge. I also will and direct, notwithstanding what is directed in the preceding clause, that should my executors think proper to sell the principal of the said stock out of the bank, and purchase an annuity with the proceeds of the said stock

¹ 21 Law J. Rep. (N. S.) Chanc. 7; 2 Sim. (N. S.) 108.

Ex parte Bryan's Trust.

for the life of my said daughter Mary, to be received by him and paid to her receipt only, I do hereby authorize and empower him so to do, but should he not so dispose of the said stock, then I give and bequeathe, after the decease of my said daughter Mary, the whole of the said stock to be equally divided between the husbands of my said daughters and my son, or to such of them as may be living at the time of my decease. And I do hereby appoint my son, John Bryan, whole and sole executor of this my will and testament."

The petition then stated that the testatrix died in March, 1809, and the will was duly proved by her son, John Bryan. That at the time of her death the only stock remaining in her name, was the sum of 372*l.* 16*s.*, 3*l.* per cent. reduced annuities. That at the time of her death the testatrix left, her surviving, the said John Bryan, her son, and her three daughters, Ann, the wife of James Winson, and the said James Winson, Harriet, the wife of the petitioner, William Darnborough, and the petitioner, and Mary, the wife of W. Dudley, and the said W. Dudley. That the said J. Winson died in February, 1829, and the said W. Dudley died in May, 1849. That the said J. Bryan died in June, 1824. That the said Ann Winson intermarried with Joseph Strutt, in July, 1829, and afterwards died in March, 1850. That the said Mary Dudley did not marry again, but died in April, 1850. That at the time of the death of the said Mary Dudley, the petitioner and the said J. Strutt, were the only husbands of the daughters of the testatrix, Ann Bryan, who were then alive and who survived the said Mary Dudley; and the petitioner submitted that he thereby became entitled to the whole of the said trust fund, the said J. Strutt having intermarried with the said Ann Winson long after the death of the testatrix. That the said J. Strutt died shortly after the death of Mary Dudley, and on the 14th of May, 1850, having made his will, and appointed J. Chamberlain and R. Chamberlain his executors, who duly proved his will, and became his legal personal representatives.

The petition, which was presented by the said W. Darnborough, prayed a declaration that, under the circumstances, he was entitled to the whole of the said trust fund.

Bethell and *E. F. Smith*, in support of the petition, contended that the testatrix, by the expression, "the husbands of her daughters," meant only those husbands who were living at the time she made her will, and that Mr. Strutt, the second husband of one of her daughters, was not entitled to any share in the trust fund. The following cases were cited. *Garratt v. Niblock*, 1 Russ. & M. 629; *Parker v. Marchant*, 1 You. & C. C. C. 290; s. c. 11 Law J. Rep. (N. S.) Chanc. 223, and 12 Law. J. Rep. (N. S.) Chanc. 385.

Grenside, for the representatives of J. Strutt, contended that the testatrix meant to designate any person standing in the conjugal relation to her daughters at the death of Mary Dudley.

SIR R. T. KINDERSLEY, V. C. I cannot say I think the case of

Mather v. Norton.

Garratt v. Niblock governs this case necessarily, because there there was an express indication that the testator had in view a particular individual: if he meant any wife he would not have said "his beloved wife." The expressions "my wife" and "my beloved wife" are certainly not synonymous. The question here is, whether the testatrix meant a class of persons or certain individuals. She has used no expression to indicate which she intended. She says, "to be divided between the husbands of my daughters and my son, or to such of them as may be living at the death of my daughter Mary." Now, it appears that the testatrix had before mentioned her son John, and that she had but one son; therefore I think it clear that in using the expression "my son" she meant to designate her son John, and not any son she might have, or who might be living at her decease. Now, the husbands of her daughters, whom the testatrix knew as well as her son John, would naturally be objects of her bounty; and as she designates her son as an individual and not a class, I think the same construction ought to apply throughout the clause, that is, that all the husbands mentioned by the expression, "the husbands of my daughters," meant the individuals whom she knew as the then husbands. I am therefore of opinion that Mr. Darnborough, the petitioner, the only husband of those living at the death of the testatrix who survived Mary Dudley, the tenant for life, is entitled to the whole fund, to the exclusion of Mr. Strutt. I think, however, that this was a fair question, arising from the language of the testatrix; and therefore that both parties should have their costs.

MATHER v. NORTON.¹

December 3, 1851.

Will — Construction — Power of Sale — Charge of Debts.

A testator, by his will, appointed A, B, and C, to be his executors, in trust to dispose of his property in the following way: — He then directed that all his debts should be discharged by his executors, and that the residue of his property, real and personal, should be disposed of by them at the time therein mentioned, save and except his estate at M., which he gave to A for life, and at A's death to be disposed of as aforesaid: —

Held, that A, B, and C had a power of sale of the estate at M.: and that it was not necessary for them to show that there were any of the testator's debts left unpaid.

THOMAS RYLANCE made his will, dated the 29th of January, 1827, in the following terms: —

"In the name of God, Amen. I, Thomas Rylance, do declare this to be my last will and testament, and dispose of my property in the manner following, viz.: — First, I appoint Francis Mather, of Bury, and William Bowker, of Hyde Hall, Denton, to be my executors, and my wife, Mary Rylance, my executrix, in trust to dispose of my pro-

Mather v. Norton.

perty in the following manner, namely: I direct that all my just debts and funeral expenses be discharged by my executors and executrix, and the residue of my property, both real and personal, to be held by my executors and executrix for the sole benefit and use of maintaining and educating my children, until my youngest child arrives at the age of twenty-one years. At such time it shall arrive at the age aforesaid, then all my property, both real and personal, whatsoever and wheresoever, to be disposed of by my executors and executrix and divided amongst my children, equal share and share alike. If in case any of my children die leaving issue, then to take their father's or mother's share as if they were then living, save and except my estate at Mellor, in the county of Derby, which said estate I give to my wife, Mary Rylance, to hold and enjoy during her natural life, and, at her decease, to be sold and disposed of by my executors, and divided amongst my children or their issues as aforesaid."

The testator died in October, 1838. Mr. Bowker, one of the trustees, died soon after the death of the testator. Mrs. Rylance, the widow, married Mr. Shepherd. Mr. and Mrs. Shepherd and Mr. Mather entered into an agreement with Mr. Norton to sell him the estate at Mellor, mentioned in the will. Mr. Norton having declined to complete the purchase, a claim was filed against him for a specific performance of the agreement. The only question in the case was, whether Mr. and Mrs. Shepherd and Mr. Mather had, under the will, a power of sale.

Malins and *H. Humphreys*, for the plaintiffs, contended that all the real estate had been devised to Mr. Mather and Mrs. Shepherd in fee, and that the real estate had been charged with the payment of debts. The executors and devisees in trust then had a complete power of sale; and the circumstance, that the estate in question had been made the subject of a subsequent disposition, was immaterial. *Shaw v. Borrer*, 1 Keen, 559; s. c. 5 Law J. Rep. (N. s.) Chanc. 364.

Bird and *Berkeley*, for the defendant, contended that the fee of the estate in question had not vested in the executors, and that the words "save and except," in the latter part of the will, must be read as qualifying the more general expressions in the earlier part. *Doe v. Hughes*, 20 Law J. Rep. (N. s.) Exch. 148; s. c. 3 Eng. Rep. 554. At any rate, it had not been proved in that case that there were debts of the testator unpaid. Satisfactory proof that there were debts unpaid ought to be afforded to the defendant. *Gosling v. Carter*, 1 Coll. 644; s. c. 14 Law J. Rep. (N. s.) Chanc. 218.

Malins, in reply, contended that it was not necessary to give any proof that there were any debts unpaid.

SIR J. PARKER, V. C., said that, although there was no direct devise to the trustees, there was a good present devise to them by implication. This devise included the real estate, and the whole real estate. He thought also that there was a charge of debts on the whole real estate.

Hodgson v. Earl of Powis.

With a devise, then, to the trustees of the whole real estate, and a charge of debts on the whole real estate, the trustees had the power to dispose of it for the payment of the debts. He thought that there was no doubt that the clause "save and except my estate in Mellor," &c., ought to be taken as qualifying "the residue of my property, both real and personal," after the payment of the debts, and not as affecting the devise to the trustees in the earlier part of the will. There must be then a decree for a specific performance.

Malins asked for the costs.

Bird contended that there was sufficient doubt in the case to induce the court not to give costs.

SIR J. PARKER, V. C., said that he had so little doubt as to the construction of the will, that if pressed he must give the plaintiffs their costs.

HODGSON v. EARL OF POWIS.¹

November 13, 1851.

Railway Company—Injunction.

A company was authorized by three acts of parliament to make three distinct railways, (not forming one line,) with separate amount of capital for each. Another railway company was, by a fourth act of parliament, authorized to take a lease of the three lines, and did so; and the whole undertaking was placed under the control of a joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and the directors made calls for the purpose of entirely finishing the opened line, the other two being abandoned. An injunction was granted at the Rolls, restraining the application of money and the making of calls for any purposes not authorized by the three acts, excepting only for the purposes of ordinary repair:—

Held, on appeal, that on an interlocutory application, in the absence of the lessee company, the opened line being worked under the direction of the joint committee, the injunction must be dissolved.

THIS was an appeal motion from an order for an injunction made by the late Master of the Rolls, Lord Langdale. A full detail of the facts of the case and the judgment of Lord Langdale are reported in 19 Law J. Rep. (N. S.) Chanc. 356, 418. In order to render the grounds of the judgment on the appeal apparent, it will only be necessary now to state that the Shropshire Union Railways and Canal Company (that being one company) was empowered to make three distinct railways, the first from Shrewsbury to Stafford, the second from Newton to Crewe, and the third from Calverly to Wolverhampton. In the following session of parliament a fourth act was passed, by which the Shropshire Union Railways and Canal Company was

¹ 21 Law J. Rep. (N. S.) Chanc. 17; 15 Jur. 1022.

Hodgson v. Earl of Powis.

empowered and required to grant, and the London and Northwestern Railway Company to accept a lease of those railways, when completed, on certain specified terms; and it was directed that the whole should be placed under a committee of management, composed of directors of each of the companies. By the first act 800,000*l.* was to be raised, by the second 1,500,000*l.*, and by the third 1,000,000*l.* Shares were issued to raise the sums in 165,000 shares of 20*l.* each, and calls were made. An action was brought against Mr. Hodgson, in July, 1850, for a third call. Mr. Hodgson filed his bill on behalf of himself and the other 20*l.* shareholders, against the company, which, after alleging that the only part of the three lines which had been constructed was a portion of the Shrewsbury and Stafford line, which had been opened, but that the other two lines were to be abandoned, the directors determining to apply to parliament for authority for so doing; and after insisting that the directors had no power to construct the Shrewsbury and Stafford line only, prayed a declaration that it was not in the power of the directors to apply the moneys raised under the several acts, or any of them, for this exclusive purpose, and for an injunction to restrain it, and to prevent the enforcing calls except for the purpose of all the acts. Lord Langdale held that the company had no right to apply the funds in making one only of the three railways, but there being no allegation in the bill that the directors intended to apply the funds exclusively to the formation of one only of the three lines, a demurrer to the bill was allowed on that ground. The court gave leave to the plaintiff to amend. The bill was accordingly amended, and the affidavits having been resworn, with some few variations, the injunction was moved for and granted, not extending to the restraint upon making calls, and permitting the application of the money for ordinary repairs. From this order the appeal was made.

From the evidence, which was very long and very conflicting, it appeared that the line opened was worked by the London and Northwestern Railway Company, under the direction of the joint committee; that the plaintiff knew of the intended abandonment of the two lines upwards of a year before the filing of the bill, and that there was no intention or wish to stop the working of the completed line. The London and Northwestern Railway Company (the lessees) were not represented on the motion. The arguments on the appeal were, in most respects, a repetition of those used in the court below.

Rolt, Willcock, and Speed, for the appellants, argued that the effect of the injunction was to prevent the defendant from doing any thing whatsoever, even from doing what they were not only enabled, but were bound to do under the terms of the leasing act. The company were authorized to make three lines, and they had made one, which they wished to complete; the reason for abandoning the other two was, that they would not be profitable. If the money were paid as they wished, the one line would be rendered profitable, while, if the injunction were continued, all the money already expended would be thrown away.

Hodgson v. Earl of Powis.

Roundell Palmer contended that the company had no right to apply any part of the capital authorized to be raised for either of the two lines now abandoned in the completion and extension of that which was opened. Each capital was applicable to the formation of each line, and each line only. The principle governing such a case was fully laid down in the case of *Cohen v. Wilkinson*, 1 Hall & Twells, 554; s. c. 18 Law J. Rep. (N. S.) Chanc. 378, 411; it was held that a company could not apply an entire fund for the completion only of a part of an undertaking.

Speed, in reply. The company ought not to be restrained from making and completing the Shrewsbury and Stafford line, they not being able, with any prospect of profit, to form the other two. The case of *Cohen v. Wilkinson* is obviously distinguishable from this, and its principle does not apply. To abandon one part of a long and continuous line is very different from making one line of three. At any rate, the London and Northwestern Railway Company ought to have been represented on this motion, they having a very material interest in the question, and they being, as lessees, actually working the line from Shrewsbury to Stafford, under the direction of the joint committee. The evidence, also, is clear to show that the plaintiff must have known long before the filing of the bill of the intended abandonment of the two other lines, and, therefore, he must be taken to have acquiesced in what has been determined on.

KNIGHT BRUCE, L. J. As to this injunction, we have arrived at the same conclusion, whether precisely by the same course of reasoning is not very important to inquire. However, I wish the observations I am about to make to be taken as coming from me alone. I view this injunction as preventing in effect the defendants from applying a single shilling of the corporate money unless for the purpose of paying debts or liabilities which were in existence at the date of the notice of motion at the Rolls, and unless for the current expenses of the railway or canals; which, of course, prevents them from laying out a single shilling in improving the railway or adding to the works or conveniences connected with it, as I understand the order. But to what state of things do these observations apply? They apply to a case where, in the first place, a railway company which is importantly interested in the order sought is absent; a company which has, under a lease, possession of, and the working of the railway; which has the very management of the concern under the superintendence of a joint committee composed of members of this railway company and the absent company. But this is not all. One line of the system of railways in question, namely, that from Stafford to Shrewsbury being in actual operation, the continuance of such operation is not attempted to be stopped. The plaintiff accedes to the proposition, that in the actual state of things, this line must proceed and must go on. Indeed, no other proposition can be accepted as reasonable, otherwise a very large amount of property would be doomed to destruction. In such a case, where the plaintiff makes such

Hodgson v. Earl of Powis.

admissions, and where absent parties are importantly interested, he desires an injunction to prevent the application of a single shilling in additional buildings and improvements to make the outlay which has been already incurred profitable to himself and his partners.

It may be that these remarks are sufficient to dispose of the case, but this is not all. It has been assumed that this case is equivalent to that of *Cohen v. Wilkinson*, since here several acts of parliament are made and formed into one act, having reference to the same subject-matter, with one capital stock, although to be carried into execution by the construction of various lines of railroad; and it has been assumed that because some part of the undertaking has been abandoned and some part retained, therefore a separate and distinct line cannot be made. But it is made and in operation, and if it were not, I am not persuaded that the principle of *Cohen v. Wilkinson* applies here. But more, — as a judge, I am bound from the facts before the court, to make the unavoidable inference that for more than twelve months before the bill was filed, the plaintiff must have known that the abandoned lines would be abandoned, and that there was no substantial chance of making either of them within the time fixed by parliament, and yet there was no bill filed until the month of November, 1849. As a matter of fact, I believe that for more than twelve months, Mr. Hodgson knew that these lines could not and would not be proceeded with, and that there was no intention existing anywhere to attempt to proceed with them or either of them. Besides all this, I observe that this is an interlocutory application for an injunction, as to which the court has always exercised a discretion, balancing and considering whether greater mischief would follow the granting or refusing of the injunction. The plaintiff comes here with a doubtful equity, and I am disposed to think that if his equity were clear, greater mischief would be done by granting than by refusing this injunction, and this even to his own property. I find that there has been here an acquiescence of a more than ordinary amount and of a very plain description. My Lord Cranworth agrees with me: — we have arrived at the same conclusion, although perhaps, not exactly by the same process. We therefore dissolve the injunction. But it is said, that this will leave the defendants at liberty to make the Stone and Shallowford branch line. Perhaps this may be so. I am not sure that what is true of one line is not true of the two branches. But these two branches are not yet begun. If they shall be begun, and the plaintiff shall think himself entitled to complain, he may come here and complain and he shall be heard. We do not wish to prejudice any question that may arise, but at present it is extremely doubtful whether these two branch lines will be touched. The order we shall make is to discharge the order and dissolve the injunction, without prejudice to any future application, and without prejudice to any question. Reserve the costs of this motion and of the motion before the Rolls.

LORD CRANWORTH L. J. I entirely concur in the order which has just been pronounced. I have come to the same conclusion

as Lord Justice Knight Bruce, and perhaps by nearly the same reasoning. I confess I had some difficulty in seeing any distinction between the effect of three acts of parliament authorizing three lines forming a cluster, as it were, and one act authorizing one line. The principle appears to be exactly the same. But although when parliament has authorized one line or one cluster of lines, the parties must execute the whole, and, therefore, are acting in violation of the act unless they execute the whole, yet this court has always exercised some discretion in matters of injunction,—especially when an injunction is sought, as in the present case, on an interlocutory application; and I confess that when one line only has been authorized to be made, I should feel less unwilling to exercise that discretion than when several lines are authorized to be made, because when one line of several is completed, this, though not all which is authorized by the act, is yet a substantial whole in itself, and this is not the case when a part only of a single line is in operation. For the exercise of this discretion of interposition by injunction there is plenty of authority; and I confess that if there were neither precedent nor authority, I should not be in any degree reluctant to make one. In this case, the facts are clear. Putting aside the consideration of the two branches to Stone and Shallowford, proposed to be added to the present line, one line is completed, but considerable additional expense may be usefully incurred in rendering the outlay already made, profitable. Now the effect of this injunction is, that not a single shilling can be expended in this manner. Early in the argument, I was struck with a passage in the order appealed from, in which Lord Langdale qualified his injunction by the explanation that he did not mean to include ordinary repairs. Now the necessity for introducing this qualification led me to doubt whether the injunction could be right in its integrity. Other like modifications suggested themselves to my mind, so as to leave some matters which clearly ought to be left in the discretion of the committee of management (if they were to have any management at all) untouched by the injunction, and I found that I must extend the qualifications to such an extent as to work a complete modification of the injunction. I was, therefore, convinced that an injunction was not the right course, for in fact the court cannot anticipate every thing which would be required. The necessity for any qualification at all satisfies me that this is not a proper case for an injunction at all. With respect to the argument of acquiescence, I fully coincide with what has been said by the Lord Justice Knight Bruce, so that I need say nothing more on that head. So much has been done, and so much more remains to be done in order to render the expenditure which has been already incurred useful or profitable, that it would be unwise to fetter the discretion of the directors by continuing this injunction, and, therefore, it must be dissolved in the terms which my Lord Justice Knight Bruce has already mentioned.

—

Potter v. Baker.

POTTER v. BAKER.¹

November 21, 1851.

Will—Construction—Perpetual Annuity.

A testator, by his will, gave to E. L., "50*l.* per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty; but if either of them die, to be paid to the survivor":—

Held, affirming a decision of the Master of the Rolls, that the bequest was of a perpetual annuity.

THE testator in this cause, William Hawkins, by his will, dated the 11th of April, 1822, bequeathed as follows:—"I appoint Mr. Thomas Baker and Mr. Edward Wallis, my executors, that as soon as possible after my decease that my freehold house known by 'The Red Lion,' in Parliament Street, Westminster, in the county of Middlesex, to be let on lease at the option of my executors for the space of twenty-one years, or thirty-one, which may be able in proportion to get the most money for. In the next place, I leave each of them my executors 10*l.*: and all the money arising from good-will, fixtures, plate, china, glass, and all other effects producing from my said freehold, and after all my just debts and funeral expenses are paid, then my executors shall put the money into the funds to the best advantage for those who I shall hereafter name. The first is my daughter Mary Ann Wiseheart, I give to her 50*l.*, and to be paid to her half-yearly as long as she lives, and her receipt only shall be a discharge to my executors; and after her decease then that 50*l.* per year shall go one half to Elizabeth Luckhurst, and the other half to Mary Ann Ballard, who now resides with me here, who I shall name after. In the next place, my executors will give, as a token of respect to my late wife, to L. Bromley 10*l.* for mourning. In the next place, I give to John Lemon my silver tortoise-shell snuff box, but if he should die before me, I then give it to Henry Steeres. In the next place, I give to Elizabeth Luckhurst, of No. 10, Brook Street, Lambeth, 50*l.* per year, for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty, but if either of them die, to be paid to the survivor. In the next place, I give all my remaining property to Mary Ann Ballard, whatever it might produce, either from the rent of the house, or money in the funds, and she shall remain in the house till it is let if she thinks proper, and after one year I wish the house to be sold to the best bidder, and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money to be divided, after her decease, amongst her four children or any more she may have in my lifetime, share and share alike as they come to the age of twenty-one."

The suit was instituted for the administration of the testator's estate, and by a decree of Lord Brougham, dated in 1831, the legacies were

¹ 20 Law J. Rep. (N. S.) Chanc. 11; 15 Jur. 1068.

Potter v. Baker.

declared to be well charged on the freehold estates of the testator. The three children of the legatee, Elizabeth Luckhurst, assigned their several interests to Mr. Scarth, and Elizabeth Luckhurst having died, the three children and their assignee presented a petition in the cause, praying that it might be declared that the annuity of 50*l.* was a perpetual annuity, and (as the produce of the freehold estates had been paid into court) that the sum of 1,666*l.* 13*s.* 4*d.* consols might be raised thereout, and be transferred to Mr. Scarth. Lord Langdale made the order as prayed. The persons representing Mary Ann Ballard and her children, the residuary legatees, appealed.

Follett and Osborne, for the appeal, cited *Innes v. Mitchell*, 6 Ves. 465; s. c. 9 Ves. 212; *Blewitt v. Roberts*, Cr. & Ph. 974; s. c. 10 Law J. Rep. (N. S.) Chanc. 342; *Yates v. Maddan*, 16 Sim. 613; s. c. 18 Law J. Rep. (N. S.) Chanc. 310; *Stokes v. Heron*, 12 Cl. & F. 161; *Hedges v. Harpur*, 9 Beav. 479.

Roll and Selwyn, for the respondent, the assignee of the children of Elizabeth Luckhurst.

Lloyd and Hardy, for the executors.

LORD CRANWORTH, L. J. I have no doubt whatever upon this will, and therefore proceed at once to declare that I am clearly of opinion that the Master of the Rolls was right. Although an obscurely-worded will, the production of an illiterate person, is always in the predicament that it may strike different minds in different ways, yet I think when this will is investigated, the construction which ought to be put upon it is tolerably free from doubt.

The general rule no doubt is, that where an annuity is given to a person by name, and there is nothing more, that is only an annuity for the life of the donee. But, then, this must be coupled with the observation that being a general rule it must yield to the force of particular expressions, if any, to be found in the will. Are there then any such particular expressions to be found in this will? On looking into the nature of the property, and the manner in which the testator deals with it, I think there are. I agree that it is doubtful with respect to the public-house being let on lease whether "the most money" mentioned by the testator is intended to apply to premium or rent. I think, however, it means the former:—that the house was to be let in this manner for as large a premium as could be obtained, and then sold, and the property to be put in the funds. Then comes an annuity to Mary Ann Wiseheart. It is to be observed there is no provision made for her children, and after her decease that annuity, or an annuity of similar amount, is given, one moiety to Elizabeth Luckhurst, and the other moiety to Mary Ann Ballard. These two women were probably both cohabiting with the testator; at any rate they both had children, and the testator afterwards proceeds to make provision for those children. I say nothing, because no question is now raised, as to what Elizabeth Luckhurst and Mary Ann Ballard take

under this bequest. I only observe that the language of this gift is very different from that afterwards employed in making provision for their families.

The testator, after certain pecuniary legacies, then proceeds as follows:—"I give to Elizabeth Luckhurst 50*l*. for she and her three children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty, but if either of them die to be paid to the survivor." The question is, what does the testator here mean by "money?" Does he mean the capital representing the annuity, or an annuity only? In my opinion he clearly means the *corpus* from which the annuity in question would be derived. I base this opinion on two grounds: first, because I think that by the word "money" an ignorant person in the testator's situation clearly means something different from the provision which he had before made. "If either of them die" must mean die before that period at which he is to receive it, that is, before twenty-one. This, therefore, is a gift to the mother for her life, with remainder to the children absolutely, payable on their attaining twenty-one. The second circumstance on which I rely is from the terms of the residuary gift to Mary Ann Ballard. "I give my remaining property to Mary Ann Ballard whatever it might produce, either from the rent of the house, or money in the funds," and so on, and the house to be sold, "and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money to be divided after her decease amongst her four children, and any more she may have." It is suggested that this means that Mary Ann Ballard is to take, after the decease of Elizabeth Luckhurst and her children, the annual produce of the property which is given to Elizabeth Luckhurst and her children, at any rate during their lives. I admit the words are large enough legally to bear this signification, but I do not think the testator used them in such a sense; for the subject of this residuary bequest is to be put in the funds, and Mary Ann Ballard is to have the produce during her life, and then at her decease the "money" is to be divided among her children. What "money" is this? Not the money, the annual interest of which Elizabeth Luckhurst and her children were to enjoy, because that was to be enjoyed by them, at all events, for their lives; and, therefore, that fund would not be divisible at the time appointed for the division in the residuary bequest, viz., the decease of Mary Ann Ballard. I think, therefore, that the judgment of the Master of the Rolls was right.

KNIGHT BRUCE, L. J. The impression upon my mind at the opening was different from that which I afterwards felt. The will is open to some unanswerable observations inconsistent with the notion that the children of Elizabeth Luckhurst take only for life. In my own opinion the clauses of this will cannot, for the purposes of construction, usefully be read in the strict order in which they occur. We must look at the entire system of the will, and so viewing it I am satisfied that by the gift of "the money" to the three children the testator intended a gift of the whole fund producing 50*l*. per annum,

Lushington v. Boldero.

which in this case I suppose has been rightly estimated at the sum of 1,666*l.* 13*s.* 4*d.* 3*l.* per cents. As the appellants are the residuary legatees, let the costs come out of the estate; but so far as they have been increased, if at all, by Mr. Scarth being a party to the appeal, or of having taken the assignment, we make no order.

LUSHINGTON *v.* BOLDERO.¹

November 24, 1851.

Waste — Timber — Money in Court — Accumulations, Right to — Settled Estates.

Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court; this, with the accumulations, amounted to 26,133*l.* 2*s.* 10*d.* Two of the tenants for life died without issue; H. L. attained twenty-one, and being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations: which were ordered to be transferred to him

JOHN BOLDERO, by his will, dated the 31st of December, 1785, gave and devised certain real estates for the terms of 1,000 years, and subject thereto unto and to the use of his son, Charles Boldero, and his assigns, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the said Charles Boldero successively in tail male; with remainder to the use of his son, William Boldero, and his assigns, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said William Boldero successively in tail male; with remainder to the use of Henry Lushington, the eldest son of his daughter Hester Lushington, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said Henry Lushington, successively in tail male; with remainder to Stephen Lushington, the second son of his daughter Hester, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said Stephen Lushington successively in tail male; with divers remainders over.

On the 22d of August, 1787, the testator, by a codicil to his will, directed the devisees to uses with all convenient speed after his death, for such time and so long as Charles Boldero should continue unmarried, from time to time to demise and lease the house called Aspeden Hall, with its appurtenances, and his park, called Aspeden Park, and

¹ 21 Law J. Rep. (N. S.) Chanc. 49; 16 Jur. 140.

Lushington v. Boldero.

the lands which should happen to be in his own actual occupation at the time of his death, with the household goods, &c., at the most improved yearly rent, for any term not exceeding twelve years, if the said Charles Boldero should so long live and continue unmarried, so as among other things no clause should be contained in such lease empowering such lessees to commit waste, and the testator directed that the rents should be invested and accumulated at compound interest, and laid out in the purchase of freehold or copyhold estates, and settled upon the uses declared by his will.

The testator died shortly after the execution of the codicil, leaving John Boldero his eldest son and heir at law, and leaving Charles Boldero, William Boldero, and Henry Lushington the tenants for life of the devised estates.

The testator to the day of his death had carried on the business of a banker, in Cornhill, in partnership with Charles Boldero, Edward Gale Boldero, and Sir Stephen Lushington, and subsequently thereto the business was continued by the surviving partners and by Henry, afterwards Sir Henry Lushington, who was admitted a partner in the house.

On the 12th of January, 1807, Sir Stephen Lushington died, and the remaining partners admitted Henry Boldero, the son of Edward Gale Boldero, a partner.

On the 2d of January, 1812, a commission of bankruptcy was issued against the firm. They were found bankrupts, and Messrs. Christopher Idle, William Timson, and Joseph Marryat were appointed assignees of the estate and effects.

This suit was instituted on the 11th of March, 1813, and it stated that the assignees of the bankrupts had caused all the timber and timber-like trees upon the park and lands at Aspeden to be marked for the purpose of felling, with an intent to sell the same as part of the estate of Charles Boldero; that the plaintiff was the eldest son of Sir Henry Lushington, and that Charles Boldero and William Boldero had not any issue, and that he, therefore, was the first tenant in tail *in esse* of the devised estates; and it prayed that the will and codicil of John Boldero might be established, and the trusts performed in respect of the devised real estates and the disposition of the rents; and that the assignees might be restrained from felling any of the timber and other trees then standing upon the premises, and from selling the same.

The assignees, however, pending the proceedings, felled the timber, &c., and received the produce of the sale.

On the 22d of March, 1819, the Master, in pursuance of a reference made to him in 1815, certified that all the timber and other trees had been left for the ornament and shelter of the house called Aspeden Hall, and the park, pleasure-grounds, and lands; and that they, and especially the trees in the valley, overlooked by the drawing-room windows of the house, were left by the testator for ornament and shelter.

On the 14th of March, 1822, the Master, in pursuance of a reference made to him on the 26th of July, 1819, certified that the removal of

Lushington v. Boldero.

the trees felled was not essential to the purpose of ornament or shelter intended by the devisor; and that the timber and other trees cut and sold did not injure or impede the growth of any other trees adjoining, which were so important to the purpose of ornament and shelter, that the removal of such timber, &c., cut, was essential to such purposes of ornament and shelter.

Upon these reports, the assignees, in pursuance of several orders, paid into court the sum of 6379*l.* 4*s.*, the amount for which the timber had been sold, to the credit of the cause, to an account entitled "The account of timber felled by the assignees of the estate of Messrs. Boldero, Lushington & Co., bankrupts." They also subsequently paid into court to the like account the sum of 2283*l.* 19*s.* 8*d.*, which was found due for interest upon that sum. Both these sums were laid out, and had ever since accumulated, and now amounted to the sum of 26,133*l.* 2*s.* 10*d.*

William Boldero died many years since without having been married, and Charles Boldero, though married, died on the 10th of September, 1851, without issue. Sir Henry Lushington was still living, and the plaintiff, Henry Lushington, having attained twenty-one, as being the person who at the time of the severance of the timber had and still had the first estate of inheritance in the estates, now asked that he might be declared entitled to the 26,133*l.* 2*s.* 10*d.* consols, and that the fund might be transferred to him.

Lloyd and Tripp, for the petitioner. The timber improperly felled was ornamental timber. Had Charles Boldero cut the timber, he could not have taken advantage of his own wrong. The money was retained in court only on account of the infancy of the party entitled to the first-vested estate of inheritance; the property in the timber however vested at the time, and Sir Henry Lushington would have been excluded from taking it; but the case became much stronger as the same assignees were appointed for all the tenants for life, and the cutting the timber related to the whole of their interest. *Lewis Bowles' case*, 11 Coke, 79, 7th Resolution; *Whitfield v. Bewit*, 2 P. Wms. 240; *Bewick v. Whitfield*, 3 P. Wms. 267; *Dare v. Hopkins*, 2 Coxe, 110; *Williams v. The Duke of Bolton*, 1 Ibid. 72; *Powlett v. The Duchess of Bolton*, 3 Ves. 374; *Delapole v. Delapole*, 17 Ibid. 150. Cases have arisen where timber had been cut on account of decay, and where it had been cut by order of the court or by trustees, and also by the wrongful act of the tenant for life, but the precise point does not seem to have been decided. *Lushington v. Boldero*, 6 Madd. 149. If the assignees had been entitled to any portion of the money, they would have applied for it. *Lee v. Alston*, 1 Ves. jun. 82; s. c. 3 Bro. C. C. 37; *Waldo v. Waldo*, 7 Sim. 261; 12 Sim. 107; s. c. 10 Law J. Rep. (N. S.) Chanc. 312; *Wickham v. Wickham*, 19 Ves. 419; s. c. G. Coop. 288; *Phillips v. Barlow*, 14 Sim. 263; s. c. 14 Law J. Rep. (N. S.) Chanc. 35; *Tullit v. Tullit*, Amb. 370; s. c. Dick. 322; *Garth v. Cotton*, 3 Atk. 751; s. c. 1 Ves. sen. 524, 546, 555; *Tooker v. Annesley*, 5 Sim. 235.

Lushington v. Boldero.

R. Palmer and Goldsmid, for the assignees. Whenever any infraction of a settlement takes place, equity contents itself by restoring what has been improperly taken from its protection, and again bringing it within the limits laid down by the settlor. *The Duke of Leeds v. Lord Amherst*, 13 Sim. 459; 14 Sim. 357; s. c. 14 Law J. Rep. (N. S.) Chanc. 73; *Mildmay v. Mildmay*, 4 Bro. C. C. 76. If the tenant for life was not entitled to the money which arose from the sale of the timber, it must then form a part of the settled estates, and the interests and accumulations would belong to the tenant for life for the time being, as a part of the income arising from the settled property. It was similar to the case of a tenant for life who had committed a breach of trust by a misapplication of the trust funds; the court would order it to be restored, but when restored, he would not be deprived of his life estate. It was admitted that the assignees of Sir Henry Lushington were entitled to the income, but it was insisted that they had forfeited their right to the income of this fund, but that was to inflict upon him a wrong done by parties acting as the assignees of Charles Boldero; that, however, would operate unjustly; it would be to enter into the question of penalties, which this court has no power to enter into.

THE MASTER OF THE ROLLS. In deciding this case I shall consider what would have been the effect if Charles Boldero had himself done this act. Here was a tenant for life, without impeachment of waste, who cut ornamental timber; the court compelled him to pay the amount for which the timber was sold into court; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine which applies to this and other cases is, that no person shall obtain any advantage by his own wrong. It is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund and thereby increase his income for life, which would not be the case if the timber were not cut. It has been observed that in the reported cases it applies to the *corpus* of the fund; but that I think ought not to vary my judgment, because it depends upon an equitable and just principle. It says no man shall obtain a benefit by his own wrongful act, but he would obtain a benefit if he obtained the interest of the fund; and the cases which lay down the principle as having relation only to the *corpus* are equally applicable to any species of interest to be derived by reason of his own wilful act. It is then said, that this is a case in which the court does not act in the way of penalty, but only by way of restitution, and that it would be a penalty upon the tenant for life, inasmuch as he has the advantage of the shade and mast of the timber, and which, if it had not been cut, he would have still enjoyed. The court deprives him of that, or rather he deprives himself of it, and the court deprives him of any substitution or remuneration for it. It is his own act. It is also material to bear in mind, that if the timber had not been cut it would have increased in value for the reversioner, but that has been

Lushington v. Boldero.

made impossible by the tenant for life having cut it. If, therefore, it was totally impossible for the court to ascertain what portion of the interest ought to be applied to the timber during the time when the reversion will fall into existence, and that portion which ought to be applied to the mast and shade of the trees which have been cut down, it is the tenant for life who has himself put the court into that situation and makes it incapable of arriving at such a conclusion. It is not a case in which the court speaks of the restitution of a fund. The case put, by way of analogy, of a tenant for life selling out the fund, and being compelled to restore it, is not here applicable, because the tenant for life cannot restore the subject-matter.

There may be a great number of cases in which the timber would become of great value when the reversion fell in, and it is impossible for the court to ascertain what portion of that would have been applied towards the reversioner if the wrongful act had not been committed. And then undoubtedly this takes place, that if the tenant for life has not committed or joined in any wrongful act, and has had nothing at all to do with it, yet he does indirectly gain an advantage, but it is not by reason of any act of his. So if by the act of God a large quantity of timber is destroyed by a storm, upon an estate, that would be laid out in the purchase of stock, and the interest of the fund would be paid to the successive tenants for life. So, upon the same principle, when there is a decay in timber. There the court cuts it down, having ascertained that it is for the benefit of all parties: the timber continuing cannot benefit the reversioner in any respect whatever; and having ascertained the fact, the court orders the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the court in that case will not allow him to gain any benefit from it; but the reversioner would take the benefit in that case arising from an accretion of the fund instead of an accretion of the timber. Can I look at this in any different point of view if assignees had done it? The assignees stand for these purposes exactly in the same place as the tenants for life; they are bound by the same equities, and are exactly in the same position and the same observations apply, nor am I able to separate the cases, or to distinguish between the cases of Sir Henry Lushington and Charles Boldero. Because, if the two tenants for life had concurred together, and had between themselves agreed that the one in possession should cut the timber, and that they should divide the produce in certain proportions, the court would have prevented either of the tenants for life from gaining any benefit from the wrongful act which they concurred in performing. Here, they are the assignees of both; and I am not able to find any principle which says, that the assignees must not stand exactly in the same situation as the tenants for life would stand, or be bound by exactly the same equities. If the tenants for life had succeeded in the matter, it might have happened that Charles Boldero might have died immediately afterwards, and that a very long estate for life of Sir Henry Lushington might have accrued, and the whole of the proceeds of that estate might have been applied in

Burgess v. Sturgis.

payment of the joint creditors. That would have been a great benefit to the creditors of the tenant for life, or, in other words, the tenant for life would have been in exactly the same position as if the wrongful act had been committed by himself alone, and he alone had been the person who had been living during the whole period of time. I cannot separate the characters of the two assignees; they are assignees for the joint creditors of the joint estate, and I consider that I must treat the case exactly in the same point of view as if the two tenants for life, though one was not in possession, had concurred in the wrongful act of cutting the timber. It was suggested, during the hearing, that I should suppose that the commission had been superseded, and I was asked whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, was to be prejudiced by reason that the assignees had committed this wrongful act. It would be hard if it were to be so, but I do not consider that question at present, because it does not occur before me. But if the question did arise, it is manifest that it would apply just as much to the case of Mr. Charles Boldero's estate, as to that of Sir Henry Lushington, nor can I find any thing whatever in the fiduciary character of the assignees, who stand, as far as the tenants for life are concerned in matters of this description, exactly in the same position as the tenants for life; nor can I find any thing in the fiduciary relation whatever to prevent their being liable exactly in the same manner as the tenants for life were. This is a wrongful act which they have done. They cannot, nor can the persons for whom they are trustees, gain any advantage by reason of their wrongful act; I am of opinion, therefore, that I must make an order upon the petition, according to the prayer.

BURGESS v. STURGIS.¹

December 6, 1851.

Claim—Foreclosure—Parties—Mortgagees.

Upon a claim by an equitable mortgagee against a mortgagor, asking for a sale, and also that the several other mortgagees might be summoned before the Master, or that a decree might be made to ascertain what mortgages there were, and their priorities, the court refused the order.

THIS was a claim by an equitable mortgagee of real estates against the official assignee of the mortgagor alone, to obtain a sale of the estate and payment of the money due. It was admitted that there were subsequent mortgagees.

Price v. Price.

Horsey asked for the usual decree, and for a direction to the Master to summon all the mortgagees—18th Order of the 22nd of April, 1850, 19 Law J. Rep. (N. S.) Chanc. 3; and contended that if this order was not made, the court would make a decree, directing the Master to inquire what incumbrances there were and their priorities, as the 8th order of the 22nd of April, 1850, provided, and that the only person to be named in the writ of summons as defendant to the suit in the first instance was the person against whom direct relief was claimed.

THE MASTER OF THE ROLLS. The relief asked is direct against all the mortgagees. Were I to make the decree, it might affect several absent parties. I think, therefore, that I cannot in the presence of one defendant alone make any such order. The claim may be amended.

PRICE v. PRICE.¹

November 25; December 2, 1851.

Deed—Voluntary Conveyance—Gift—Baron and Feme—Constructive Trust.

G. P. executed a document which was attested by two witnesses, giving and granting to E. P. his wife a freehold house in which they resided. G. P. afterwards died, without having made any will, and his heiress-at-law brought an action of ejectment to recover the possession of the house and premises from E. P. and obtained a verdict; upon which E. P. filed this bill. Upon a motion to dissolve an injunction which had been obtained:—

Held, that the gift was incomplete; that the relationship of trustee and *cestui que trust* was not created; that this court would not assist either party, but leave them as it found them; and that the injunction must be dissolved.

GEORGE PRICE, being seized of a messuage, in which he and his wife resided, duly executed the following instrument:—"July 8, 1849.—I hereby certify, that I, George Price, collier, of Whitecroft, in the township of West Dean and county of Gloucester, for and in consideration of the goodwill which I bear towards my wife Esther Price, also of the same place, have given and granted, and do hereby freely give and grant to the said Esther Price, in the presence of my uncle Samuel Price, of the same place, all my land, house, and chattels; and I hereby again declare that I, George Price, have absolutely, and of my own accord, given and granted the same without any manner of condition to the aforesaid Esther Price, and it is her sole and absolute property henceforth and forever. In witness whereof I have this 8th day of July, 1849, set my hand and seal." To this document, George Price set his mark in the presence of William Tanner and Price.

Price v. Price.

The document was delivered to William Tanner, who was requested to take charge of the same for Esther Price.

On the 20th of April, 1850, George Price died, without having made any will, leaving his wife, the plaintiff, and Emma Price, the only child of his elder brother, his heiress-at-law.

Esther Price continued to hold the hereditaments under the deed-poll, and the defendant Emma Price, by her mother as guardian, brought an action of ejectment to recover possession of the premises, and obtained a verdict. Esther Price then filed this bill, praying that Emma Price might be declared a trustee of the legal estate for the plaintiff, her heirs and assigns, and asking that she might convey the same to the plaintiff, and deliver up the deeds in her possession. It also asked for an injunction to restrain all proceedings at law.

To this bill the defendant put in an answer, and moved to dissolve the injunction which had been obtained.

Eddis, in support of the motion. — The defendant, instead of putting in an answer, should have demurred to the bill. Had that been done, the defendant could have obtained a decision upon the equitable right. The testator's husband by executing the deed converted himself into a trustee: he had contemplated a permanent provision for his wife, and that was a duty which this court would execute; *Walter v. Hodge*, 2 Swanst. 102.

Sandys, contra. The testator's widow was a mere volunteer, and had no claim to be put in a better situation than a stranger. The deed contemplated a gift, which was imperfect, and had no legal operation. Effect has been given to imperfect documents in favor of a wife and children; but the policy of the law will not allow a man to deprive himself of every thing in favor of his wife, or by that means he might defeat the claims of creditors; the wife, therefore, was a volunteer, and could have no claim under an imperfect deed against her husband or against the right of the heiress-at-law.

Eddis, in reply.

December 2. THE MASTER OF THE ROLLS. It is not disputed that the deed is wholly inoperative at law, but the plaintiff contends that this deed converted the husband into a trustee for the separate use of his wife, and that the heiress-at-law upon his death became also in like manner a trustee for the wife. On the hearing of the case I entertained a strong opinion that the deed in question created no trust which the court could enforce, and that the heiress-at-law was not converted into a trustee for the wife, but as no cases were cited, I deferred my judgment to look at the authorities. This has confirmed me in my view.

The questions are two: first, whether the gift would have been valid if it was between two strangers; and, secondly, whether its being between husband and wife made any difference. Between strangers this deed would have been inoperative in equity as well as

in law; I entertain no doubt on that point. On the other hand, if this deed is a gift, this court will not convert a gift into a trust. If I were to decide that this deed would be good as between strangers, I should in truth, be deciding that if a man executes a deed, simply declaring, "I thereby give and grant all my estate to another," and nothing more takes place, this court would compel the delivery of the estate. This would be contrary to every authority.

The next question is, was this a transaction between husband and wife which the court would carry out? A deed was executed for the benefit of the wife, it was intended to be for her separate use: do these circumstances give the transaction a different character from that which it would have had, if it had been one between strangers? Was there a trust created? In other words, could the wife, during the life of her husband, have maintained a bill in this court, by her next friend, against her husband, for the rents for her separate use? I am of opinion that no such suit could have been maintained. In *Ex parte Dubost*, 18 Ves. 140, 149, Lord Eldon said, "It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided, that upon an agreement to transfer stock this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it," but that would not be the case where a gift was intended. The obligee of a bond five days before her death, by a memorandum indorsed upon the bond, purporting to be an assignment without consideration to a person to whom the bond was at the same time delivered, was held to be an incomplete gift, and, as it was without consideration, that the court could not give it effect. *Edwards v. Jones*, 1 Myl. & Cr. 226; s. c. 5 Law J. Rep. (n. s.) Chanc. 194; *Meek v. Kettlewell*, 1 Hare, 464; s. c. 11 Law J. Rep. (n. s.) Chanc. 293; 1 Ph. 342; 13 Law J. Rep. (n. s.) Chanc. 28. In this case there was no declaration of trust; it was either a gift, or it was inoperative, and the rule of this court was, that it would not aid a volunteer to carry an imperfect gift into effect. *Colman v. Sarel*, 3 Bro. C. C. 12; s. c. 1 Ves. jun. 50; *Sloan v. Cadogan*, 3 Sugd. Vend. & Pur., App. 66; *Holloway v. Headington*, 8 Sim. 324; s. c. 6 Law J. Rep. (n. s.) Chanc. 199; and *Jefferys v. Jefferys*, Cr. & Ph. 138. I am, therefore, of opinion that the relation of trustee and *cestui que trust* was not created in this case; that the whole was an imperfect gift, and that the transaction was one, in which equity will not interfere to assist either party, but will leave them as it found them, and that consequently this injunction must be dissolved.

 Baxter v. Losh.

BAXTER v. LOSH.¹

December 11, 1851.

Legacy—Lapse—Residuary Estate—Joint Bequest—Survivorship—Implication.

A testatrix gave her residuary estate, after the death of three persons, upon trust to pay and assign it equally between G. B. and E. B., their executors, administrators, and assigns; but if neither of them should be living at the death of the survivor of the tenants for life, she gave the same to F. H. G. B. died in the lifetime of the testatrix, but E. B. survived the tenants for life:—

Held, that the gift lapsed as to a moiety of the residuary estate; that no joint estate was created between G. B. and E. B.; that no right by survivorship arose by implication; that the event had not happened upon which the gift over was to take effect; and that one moiety of the residuary estate was undisposed of and belonged to the next of kin of the testatrix, and that the costs must be paid out of her estate.

THIS was a special case under the 13 and 14 Vict. c. 35.

Sweetenham Waters, by her will, dated in 1818, gave her residuary personal estate in trust for three persons for life, with survivorship, and after the decease of the survivor upon trusts, which were expressed as follows:—"Upon trust to pay, assign, or transfer the whole of the said stocks, funds, government securities, and all interest due thereon, unto and to the use of and equally between George Baxter and Eliza Baxter, children of my sister Ann Baxter, their executors, administrators, and assigns, absolutely forever; but in case it shall happen that the said George Baxter and Eliza Baxter shall neither of them be living at the time of the death of the survivor of the said [three tenants for life] then I give and bequeathe the same to Francis Hutchinson, of Newcastle, if he shall be then living."

George Baxter died in 1821, in the lifetime of the testatrix.

The testatrix died in 1822.

The three tenants for life having died, the questions were, first, whether Eliza Baxter, the plaintiff, by the event which had happened, was absolutely entitled under the tenor of the will to the whole beneficial interest in the residuary personal estate; and if she was not so entitled, secondly, were the defendants, Jemima Porteous and Susan Hussey Elizabeth Davidson, as legal personal representatives of the next of kin of the testatrix Sweetenham Waters, entitled to have one equal fourth part of the same stock transferred into each of their names.

Stratton, for the plaintiff. The questions for consideration under this will are, whether Eliza Baxter, having survived her brother George, is entitled to the whole of the residuary estate; and if not, whether one moiety does not belong to the legal personal representatives of the next of kin of the testatrix. As to one moiety, there is little or no difficulty; but as to the other, it is submitted, that the legatees became entitled, under a joint-tenancy; or otherwise by a

¹ 21 Law J. Rep. (N. S.) Chanc. 55.

Baxter v. Losh

necessary implication, as by the limitation over, the testatrix contemplated a survivorship between George and Eliza Baxter, which was equivalent to creating a joint tenancy, especially as the gift over to Francis Hutchinson was in the event of both being dead at the death of the last tenant for life. *Armstrong v. Eldridge*, 3 Bro. C. C. 215; *Scott v. Bargeman*, 2 P. Wms. 68; *Mackell v. Winter*, 3 Ves. 236, 536; *Beauman v. Stock*, 2 Ball. & B. 406; *Townley v. Bolton*, 1 Myl. & K. 148; s. c. 2 Law J. Rep. (n. s.) Chanc. 25; *Davies v. Hopkins*, 2 Beav. 276.

Toller, for the defendants, was not heard.

THE MASTER OF THE ROLLS. The court can only put a construction upon the words of the will; it cannot make a will for the testatrix, or take into consideration whether she would have deemed it prudent to make such a disposition of her property, had she foreseen the events that have taken place. She gave her residuary personal estate to three persons, and the survivor for life. She proceeds, "and from and after their decease the stock shall be paid and transferred to George Baxter and Eliza Baxter, absolutely," with a limitation over in case of their deaths before that of the survivor of the tenants for life. George Baxter died before the testatrix; his share, therefore, lapsed, and remained undisposed of. The bequest was to the two as tenants in common; cases, however, have been referred to, in which, notwithstanding words creating a tenancy in common, a joint-tenancy, or what was equivalent to a joint-tenancy, was considered to have arisen. A tenancy in common may be created between two persons, and words may be added declaring that on the death of one, his interest should pass to the other. That would, in some respects, be similar to a joint-tenancy, but I know of no case in which the words "equally between" have created any thing else than a tenancy in common; and that was the interest which these parties would have taken; but as one of them died in the lifetime of the testatrix, that share had lapsed, and being a moiety of a residuary estate, it did not fall into the residuary estate, but was undisposed of, and passed to the next of kin of the testatrix. But the will contained a gift over to Francis Hutchinson in the event of the death of George Baxter and Eliza Baxter, in the lifetime of the tenants for life. If any was wanted, *Scott v. Bargeman* was a direct authority to show that a gift over could not take effect unless the event upon which the property was to go over happened. There a man, having a wife and three daughters, bequeathed 900*l.* to the three daughters equally, payable at their respective ages of twenty-one, or marriage, and if all should die before their legacies became payable, then the whole was to go to the mother. Two of the daughters died before their shares became due, and the surviving daughter was held entitled to the whole. In this case the event, on which the gift was to take effect, has not happened; neither are there any words by which Eliza Baxter can be considered as taking by implication. There are cases upon the subject, but no general rule has proceeded from them; every case must,

Baxter v. Losh.

therefore, depend upon the whole of the words used taken together; and in this case I consider that Eliza Baxter is entitled to one moiety of the fund, and that the next of kin of the testatrix are entitled to the other. The costs must be paid out of the estate.

CASES
IN
BANKRUPTCY,
BEFORE THE
LORDS JUSTICES AND BEFORE THE FULL COURT OF APPEAL,
DURING THE YEAR 1851.

In re HOLTHOUSE.¹

November 5, 10, and 12, 1851.

*Bankrupt Law Consolidation Act, 1849 — Certificate — Appeal —
Notice of Opposition.*

A bankrupt was refused his certificate by the Commissioner, for an offence not enumerated in the 256th section of the statute 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit, and immediately selling the same at still lower prices. He was also refused any protection except pending an appeal. On an appeal the court refused to grant any certificate, but made an order, by consent of the assignees, giving protection for the person of the bankrupt, but leaving his property liable.

A creditor who had not given three days' notice of opposition under the 198th section, and who was, therefore, refused a hearing, was not allowed to appear before the appeal court to discharge the above order of the Commissioner.

THE petition in this case was presented by the bankrupt, praying the grant of his certificate. The facts were not disputed, and were these: — The debts amounted to 10,000*l.*, the property sold by auction realized 1,357*l.* On the application, by the bankrupt, for his certificate, he was opposed by the assignees, on the ground that he had systematically bought goods at low prices and on short credit, and immediately sold them at still lower prices. The fact of such a course of proceeding the bankrupt did not deny, and it was stated in his own petition. Mr. Commissioner Fane refused to grant any certificate or protection whatever, excepting during the appeal, and from this decision the bankrupt appealed.

Cooke, appeared in support of the petition, and stated that the

¹ 21 Law J. Rep. (N. S.) Bank. 3.

In re Holthouse.

bankrupt had been in business fifty years and was seventy years of age; that Mr. Commissioner Fane, when deciding on the application, expressly stated that his judgment was not founded on the 256th section of the Bankrupt Law Consolidation Act, for that the conduct pursued by the bankrupt did not bring it within any one of the offences there enumerated. On that occasion the assignees had argued that the offence was within the third there enumerated for a fraudulent contracting of debt; but Mr. Fane refused to accede to such an argument, saying that the fraud there meant related to a fraud as against the party who sold the goods or gave the credit. The assignees then contended that the second case in the 256th section met the offence, for that with intent to conceal the state of his affairs he had falsified his books; but that was equally unsuccessful, for Mr. Fane said that the grossness of the bankrupt was made manifest by his having actually kept a full account of his improper dealings, and had he committed the second offence enumerated in the section, the assignees would not have, by such means as they had, discovered his transactions. The words of that section were imperative, for it said, if it shall appear that the bankrupt has committed any of the offences "the court shall refuse to grant such certificate." This court would hardly import into the section any offence which did not come within its words, (and the commissioner himself had said that the bankrupt had not committed any one of them,) and say that he should be punished in the same way as if he had committed one of such offences. The commissioner had acted as if he was bound to refuse the certificate, in which he had acted erroneously. The 198th section gave the Commissioner power either to suspend or refuse the certificate if the conduct of the bankrupt as a trader¹ were unsatisfactory, but that conduct must be considered with reference to the offences enumerated in the act. The legislature never contemplated this offence, grievous as that offence was, and therefore did not provide against it; and the term "conduct as a trader" was not governed by any rule of law, nor by any principle, legal, equitable, social, or commercial.

Malins and *Cracknall*, who appeared for the assignees, stated, in answer to a question from the court, that there was no wish to interfere with the personal liberty of the bankrupt, all that was required being to prevent him ever again pursuing such a course as he had followed, a result which could only be arrived at by leaving his property always liable for his present debts.

KNIGHT BRUCE, L. J. I see no reason for any further interference. An order may be arranged by which, with the consent of the assignees, the personal liberty of the bankrupt may not be interfered with.

Cooke. The bankrupt has had protection pending this appeal, and

¹ See the remarks of Knight Bruce, V. C., on the construction of this section in the case of *Ex parte Dornford*, 20 Law J. Rep. (N. S.) Bank. 7; s. c. 5 Eng. Rep. 242.

In re Cheetham.

no protection can be given him if his certificate is refused. The words of the 256th section are equally plain and peremptory as to that, for it says, "and shall in like manner refuse to grant the bankrupt any further protection."

KNIGHT BRUCE, L. J. Oh yes! The court may grant protection for a short time, and why not for a long time?

LORD CRANWORTH, L. J. The offence of the bankrupt comes as near obtaining money or goods under false pretences as can well be imagined. I do not say whether or not he could be indicted for that offence, nor whether, if indicted, he could be convicted. Of that I give no opinion; but systematically buying at one price and selling at a lower would lead to the inference of such an intention. A more gross case against a bankrupt I cannot well conceive than is here proved, and indeed admitted by him, and I see no reason whatever for saying that he ought to have his certificate.

An order was then arranged as suggested by the court; the assignees giving their consent.

November 10. *Rolt*, on behalf of a creditor to a large amount, obtained leave to give notice of motion to discharge the order, and on the 12th, with *Bagley*, made the same; but it appearing that this creditor was not permitted to be heard before the Commissioner, on the ground that he had not given three days' notice of opposition pursuant to the 198th section, the court decided that he could not be heard on the appeal.

LORD CRANWORTH, L. J. It appears to me to be perfectly plain that, as the act of parliament requires three days' notice of opposition to be given, and as it is admitted that no such notice was given, we have no authority to hear this particular creditor. The legislature having said that no creditor shall be heard before the Commissioner to oppose, without giving three days' notice, *a multo fortiori* a creditor who has not given such notice cannot be heard here.

The motion was, after a discussion on the question of costs, refused, with costs.

*In re CHEETHAM.*¹

November 12, 1851.

Bankrupt Law Consolidation Act, 1849—Jurisdiction—Payment of Money out of Court.

The primary jurisdiction in Bankruptcy being, by the 12th section of the statute 12 & 13 Vict. c. 106, transferred to the commissioners, and the jurisdiction of the Vice-Chancellor

In re Castelli.

under that act having been exclusively appellate and transferred to the Court of Appeal by the statute 14 & 15 Vict. c. 83, the Court of Appeal cannot order the payment of money out of the Bankruptcy Court, unless the application be made by way of appeal from a commissioner.

Elmsley appeared in support of a petition for the payment of a sum of 66*l.* and a few shillings out of the Court of Bankruptcy. The original fund belonged to four persons, infants, of whom the petitioner was one, and two of them having attained the age of twenty-one, they presented their petitions for payment out of court of their respective shares, and the same was ordered accordingly by the Chief Judge in Bankruptcy. The petitioner now having attained his age of twenty-one, asked for his share.

KNIGHT BRUCE, L. J. I made those orders as Chief Judge in Bankruptcy, before the new Bankrupt Law Consolidation Act came into operation. By that statute all the primary jurisdiction of the Court of Bankruptcy is transferred to the Commissioners; while by the statute constituting this court the jurisdiction of the Vice-Chancellor sitting in Bankruptcy, that jurisdiction being appellate only, is transferred to the Lords Justices. I consider, therefore, that on this petition we have no jurisdiction to make the order; but if the commissioner shall on application find any difficulty and decline to make it, then I think we can exercise our authority by way of appeal.

LORD CRANWORTH, L. J., concurred.

*In re CASTELLI.*¹

November 19, 1851.

Bankrupt Law Consolidation Act, 1849—Advertisement of Adjudication.

Four partners were adjudicated bankrupts. Two resided abroad. The adjudication was made on the 8th of November. On the 13th notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th the meeting was held to show cause against the issue of the advertisement, and the application was then made. The commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within seven days from the adjudication, he had no authority, under the 104th section of the 12 & 13 Vict. c. 106, to do so:—

Held, upon appeal, that "such extended time" mentioned in the section meant "further or longer time," not exceeding fourteen days; and that the notice having been given within the seven days every thing was *in fieri*, and the commissioner had authority to grant the application. The matter was, therefore, sent back to the commissioner.

THIS was an application, by way of appeal from a decision of Mr Commissioner Holroyd refusing to stay the issue of the advertisement of adjudication. Four persons, namely, Frank Castelli, Giovanni

¹ 21 Law J. Rep. (N. S.) Bank. 5.

In re Castelli.

Baptista Giustiniani, Severio Castelli, and Francisco Franciscowitch Braggiotti, carried on business in partnership in London, and were on the 8th November, 1851, adjudicated bankrupts. Two of the partners resided in Leghorn, the business being carried on in London by the others, the style of the firm being "Castelli, Giustiniani, & Company." On the 13th of November a notice was given, on behalf of the two residing at Leghorn, that an application would be made to the Commissioner, at the meeting to be held on the 17th for the purpose of showing cause against the issue of the advertisement of adjudication, to postpone the issue of the advertisement, on the ground of the absence of those parties who could if present give very material explanations of the accounts, and show that as against them the adjudication ought not to stand. The meeting was held on the 17th, when application was made to the Commissioner pursuant to the notice, but the application being made two days later than the seven days after the adjudication, he held that he had no authority under the 104th section of the Bankrupt Law Consolidation Act, 1849,¹ to suspend the issue of the advertisement, and extend the time to the fourteen days specified in that section.

Cairns, in support of the appeal, submitted, that as the notice was given within the first seven days of the adjudication, the requirements of the statute were sufficiently complied with, and if the meeting had been held on the 15th instead of the 17th, they would have been so literally. It was not the fault of the parties on whose behalf the application was made, that the meeting was not appointed earlier; that was a matter not resting with them. The view taken by the Commissioner was erroneous, for he had the authority he decided he had not, and could have extended the time to the period authorized by the act, although the application was not made within the first seven days. The court would also consider the hardship of the case of the appellants, who, residing at Leghorn, had not been served with the notice or duplicate of the adjudication.

¹ The 104th section is as follows:—"That before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged a bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the court shall think fit, from the service of such duplicate, to show cause to the court against the validity of such adjudication; and if such person shall within such time show to the satisfaction of the court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the court, the court shall thereupon order such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shown to the satisfaction of the court for the annulling of such adjudication, the court shall, forthwith after the expiration of such time, cause notice of such adjudication to be given in the *London Gazette*," &c.

In re Castelli.

KNIGHT BRUCE, L. J. I do not see why the learned Commissioner did not extend the time to the period which he is authorized to do by the act.

LORD CRANWORTH, L. J. It must be shown to us that it is a rational construction of the act, to refuse what is now asked.

Chandless contended that the terms of the 104th section were plain and positive as to the time within which the adjudication might be questioned. The expression "such extended time" manifestly was meant to commence from the end of the first seven days, and, therefore, could not be granted unless the application were made within those first seven days. He submitted that the Commissioner had taken a correct view of his authority, under the strict words of this positive enactment. That an act of parliament which lays down rules must be interpreted most strictly was adjudged by Lord Cottenham, in the case of *In re The North of England Joint-Stock Banking Company*, (*Hall's case*,) 1 Hall & Twells, 580; 1 Mac. & Gor 307; s. c. 19 Law J. Rep. (N. S.) Chanc. 69; where he refused to include any one as a contributory who did not come clearly within the definitions or one of them set forth in the Winding-up Acts. It had been urged that it was a hardship on these parties that they were absent, but the absence of parties in their position was contemplated by the legislature, and their case especially provided for. The words at the early part of section 104 were, "shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person." The application ought, therefore, to be refused, with costs.

Cairns was not called on to reply.

KNIGHT BRUCE, L. J. I am of opinion that the words "or such extended time" mean no more nor less than "further or longer" time, not exceeding fourteen days. I am of opinion that the applicants' notice of the 13th of November, for the motion to be made on the 17th, having been given within the first seven days, was sufficient. The consequence is, that, in my view, the true construction of the act of parliament requires the matter to be proceeded with and gone into by the Commissioner, to see whether the other seven days should be allowed. I think the matter should go back to the Commissioner: and if Lord Cranworth concurs in that opinion, then the case must be brought before the Commissioner within two days from this time, and being commenced within fourteen days, can be heard by adjournment as may be most convenient.

LORD CRANWORTH, L. J. I am entirely of the same opinion. I think the construction contended for in opposition to this application would be most harsh and unreasonable. The utmost latitude of construction should be put on this act of parliament. Every thing before the Commissioner was *in fieri* when the notice was given, and to hold

Ex parte Stanton; In re Stanton.

that he had no jurisdiction to grant the further seven days, because the application to do so was not actually made during the first seven days, would be, one would almost be induced to say, absurd.

*Ex parte STANTON; In re STANTON.*¹

December 20, 1851.

Bankruptcy—12 & 13 Vict. c. 106, s. 257—Judgment Certificate—Construction of Act of Parliament.

Under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106,) the commissioners have a *discretionary* power to refuse protection to a bankrupt, or to refuse or suspend the certificate of conformity, in any cases not within the penal enactment of sect. 256; and the judgment certificate mentioned in sect. 257 is to issue as well upon such *discretionary* refusal, or suspension, as upon the compulsory refusal, or suspension, in consequence of the commission of any of the offences enumerated in sect. 256. (Sir Knight Bruce, L. J., *Dubitante*.)

Semble, that wherever the commissioner thinks that the conduct of the bankrupt has been such that he ought to be amenable to the common-law rights of the creditors, it is in the power of the commissioner to withhold the protection, and so restore those common-law rights.

THIS was a motion by the bankrupt that the decision of Mr. Commissioner Evans, refusing to set aside the certificate signed by him on the 13th October last in this matter, under the 257th section of the Bankrupt Law Consolidation Act, 1849, (12 and 13 Vict. c. 106,) whereby he certified that the assignees of the said bankrupt were creditors of the said bankrupt for the sum of 1207*l.* 12*s.* 5*d.*, in trust for the creditors of the said bankrupt, and that the said bankrupt was not protected by the court from process against his person, and also refusing to discharge the said bankrupt out of the custody of the keeper of the gaol at Aylesbury, in the county of Buckingham, might be reversed, and that the said certificate, and the execution issued thereon, might be set aside, and the bankrupt discharged out of the custody of the keeper of the said gaol, on the ground that the said certificate and execution were irregular, invalid, and not warranted by the proceedings in this case; and that the assignees might be ordered to pay the costs of the application to the commissioner, and of this application.

William Stanton, the bankrupt in this case, had carried on the business of a watchmaker and jeweller in a small way, and had been adjudged bankrupt upon his own petition. He filed his balance-sheet, but upon his attending before Mr. Commissioner Evans to pass his last examination, upon the 14th January, 1851, the commissioner

¹ 16 Jur. 229; 21 Law J. Rep. (N. S.) Bank. 7. Before the LORD CHANCELLOR, (TAURO,) and the Lords Justices the Right Hon. SIR KNIGHT BRUCE and the Right Hon. LORD CRANWORTH.

Ex parte Stanton; In re Stanton.

signed the following certificate: "..... Upon the said bankrupt being examined, it appeared to me that the bankrupt had not filed any stock account or proper cash account with his balance-sheet; whereupon I did adjourn the last examination of the said bankrupt until Thursday, the 20th February next," &c. On the 20th February, 1851, the bankrupt was again examined before Mr. Commissioner Evans, when the commissioner signed the following certificate: "..... The said bankrupt being examined, it appeared to me that the said William Stanton had not filed any stock account, nor any special cash account, particularly as to the deficiency of 341*l.* 17*s.* 6*d.* referred to in his balance-sheet, and that his balance-sheet was not satisfactory; whereupon I did adjourn the last examination of the said bankrupt *sine die*, with protection until the 27th day of March next." On the 13th October, 1851, the bankrupt appeared before the commissioner, in answer to a warrant, to show cause why he had not filed a stock account and cash account, as required by his assignees; and he stated that he had not filed such stock account and cash account as required, not being able to furnish such account. The commissioner thereupon made the certificate complained of in the notice of motion, declaring that the assignees of the bankrupt were creditors to the amount of 1207*l.* 12*s.* 5*d.* and refusing the bankrupt protection in the form in Schedule (B a.) to the act 12 and 13 Vict. c. 106. The bankrupt was arrested on the 21st October, 1851, by virtue of a writ of execution issued upon such certificate. See sect. 257 of stat. 12 and 13 Vict. c. 106, in note. On the 24th November, 1851, the bankrupt moved before the commissioner that his certificate of the 13th October might be set aside, and that the bankrupt might be discharged out of custody; and the commissioner refused the motion. The present motion was an appeal from that decision. The question turned upon what was the true construction of sect. 257 of the 12 and 13 Vict. c. 106, taken in connection with sects. 256 and 259. The Lords Justices of the Court of Appeal having been unable to come to an unanimous opinion upon the question, it was now urged before the full court.¹ The bankrupt, in an affida-

¹ The sections of the act which were chiefly referred to in the argument will be found in the 39th group or division of sections; that division is headed, "And with respect to offences against the law relating to bankruptcy and other matters in this act, be it enacted," and contained sects. 251 to 275 inclusive.

The 256th section was, so far as is necessary to state, in these words: "That if, at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the court that the bankrupt has committed any of the offences hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest; and if, at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." The section then enumerated nine classes of offences; but it was admitted by the counsel for the assignees, that the not keeping a stock account by the bankrupt was not an offence within either of those classes, there being no proof that this omission was done wilfully, and with an intent to conceal the true state of his affairs.

The 257th section, after declaring that the assignees shall be deemed judgment cre-

Ex parte Stanton; In re Stanton.

vit in support of the present motion, stated that he did not keep either a stock-book or a cash-book, not being aware of the necessity of so doing, and that he was therefore unable to comply with the requisition of his said assignees, but that he gave them the best account he was able to do respecting his stock and cash transactions.

C. P. Cooper and Simpson, in support of the motion, contended that the only cases in which the commissioner could, under the 257th section, grant a *judgment certificate*, were those where the commissioner had refused further protection, or refused or suspended the certificate, under the 256th section, in consequence of it appearing to the court that the bankrupt had committed some one of the offences therein enumerated; and that it never could have been intended, that in every case where protection was refused a *judgment certificate* should issue, and thereby empower a creditor who had proved his debt to do that which is so inconsistent with the bankrupt law — namely, to come in under the bankruptcy, and also to arrest the bankrupt: that it was clear, from the 259th section, that it was speaking of imprisonment under the new penal enactments of the 256th and 257th sections; otherwise what would have been the sense of postponing the taking effect of that which was old law for a period of six months? and why should the bankrupt be kept in prison for a year, even after payment of his debts, unless as a *punishment*? but that, under this section, if every creditor was paid in full, still he must remain in prison, except by order of the court: that the only place where the words “be it enacted” occurred was in the in-

ditors of the bankrupt for the whole amount due to his creditors, and each creditor a judgment creditor for his amount of proof, proceeds: “And the court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the court, in the form contained in schedule (B a.) to this act annexed; and every such certificate shall have the effect of a judgment entered up in one of her Majesty’s superior courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior courts to make such orders and rules in that behalf as to them shall seem fit: provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance: provided also, that no execution by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt, after the allowance of his certificate of conformity.”

Sect. 259: “That if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the court: provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and then only against such persons as shall have been adjudged bankrupt under this act, and for offences committed after the commencement of this act.”

Ex parte Stanton; In re Stanton.

troductory heading before the 251st section; and that, therefore, all the sections in group 39 must be taken in connection, otherwise there is nothing to denote that the 257th might not be an exception or a proviso: that if a dividend had been paid, still, according to the 257th section, the judgment would be for the whole amount.

[LORD CHANCELLOR. That is often the case at law, and then there is an indorsement of what is paid?]

But the bankrupt would have to come to the court to get his discharge; the prisoner would, at common law, be discharged immediately upon the payment: not so in the present case, which proves that it is not for the *debt*, but for the penal offence created by the 256th section, that he is imprisoned.

[KNIGHT BRUCE, L. J. Supposing that we do not interfere, is it or not clear that he cannot be relieved under the Insolvent Debtors Act?]

E. Cooke, (of the Insolvent Court,) A. C., said that the principle acted upon in the Insolvent Court was, that where the Bankruptcy Court had jurisdiction in the matter, and power to discharge a prisoner, the Insolvent Court would not interfere.

Counsel for the bankrupt then contended, that it would be contrary to the genius of the constitution that a man should be committed to prison upon a common form, (Schedule B a.) which issued as of course upon the certificate of the commissioner, unless, indeed, that certificate was granted in consequence of the committal by the bankrupt of one of the penal offences enumerated in the act of parliament: that it would be monstrous to say that this common form was to issue upon the mere semblance of an offence; and that the only rational construction was, to hold that this common form was to issue in those cases only where, in fact, the commissioner was *bound* to issue the certificate—namely, upon his being satisfied that the bankrupt had committed one of the offences enumerated in sect. 256.

James Russell and *Sturgeon*, for the assignees, contended, that in every case where the commissioner shall have refused the bankrupt protection, or shall have refused or suspended his certificate, any creditor, or the assignees, were entitled to a certificate in the form in Schedule (B a.), according to the 257th section. That the only effect of the 256th section was to restore to creditors their common-law rights of imprisoning their debtor, where their opinion and the judgment of the commissioner agreed as to the commission of any one of the particular enumerated offences; and that there was no distinction as to the effect of the commissioner refusing protection, or refusing or suspending the certificate for those *specified* offences, than for any other offence which, in the *discretion* of the commissioner, might induce him to refuse the protection; and that the only difference was, that in the event of one of the offences enumerated in sect. 256 being proved to have been committed, the commissioner had no *discretion*, but was *bound* to refuse protection, or to refuse or suspend the certi-

Ex parte Stanton; In re Stanton.

ficate; thereby restoring, in those cases, the common-law rights of the creditors. That if it had been intended to limit the issuing of the certificate to certain cases where some particular offence had been committed, there would have been inserted in form (B a.) some words to that effect, but there were none such. That it was clear that the proviso at the end of sect. 257 was contemplating the case of a judgment certificate having issued under a *discretionary* refusal of protection, for it says that immediately upon the allowance of the certificate of conformity, the previous certificate shall be deemed to be cancelled; whereas, if the argument of the other side be correct, that certificate, which is to be deemed to be cancelled, can only have issued where the bankrupt had committed an offence, which took away all discretion from the commissioner to allow the certificate of conformity.

[KNIGHT BRUCE, L. J. Your argument would be entitled to great weight if that section was only speaking of refusal of *protection*, but it also speaks of refusing or suspending the certificate.]

But for that circumstance, it would be impossible to escape from the conclusion for which we contend. If the 259th section is to enter into the consideration of this case, it is in our favor.

[KNIGHT BRUCE, L. J. It is agreed on both sides that that section is not applicable to the present case, but I admit that it may illustrate the argument.]

The words "this enactment," in that section, mean the immediate enactment in that section as to the non-discharge of the prisoner until after the year.

[KNIGHT BRUCE, L. J. If you are right on that, it decides the question; but what do the words "for offences committed after the commencement of this act," mean?]

They mean, for offences committed after the six months from the commencement of the act.

[LORD CRANWORTH, L. J. If the 259th section be construed as applicable to all the provisions from sect. 251 down to sect. 259, then no person could be punished for any offence whatever which was committed prior to the expiration of the six months from the commencement of the act. That would not be sensible.]

Simpson, in reply. The 259th section cannot be construed by itself; there would be nothing for it to operate upon, but the words "by order of the court." If, then, it cannot be taken by itself, to what do the words "this enactment" apply? Clearly, the new offences and their consequences created by the 256th and 257th sections; and by this construction the words "*for offences*," in the 259th section, become relevant. By this construction also the suspension for six months is explained; it would not be rational as applied to old matter; and, in fact, the commissioners have acted upon this construction, for they did not act upon this new matter until after the six months had expired.

At the close of the arguments, their Lordships consulted together for some time.

Ex parte Stanton; In re Stanton.

LORD CHANCELLOR, (Lord Truro.) I think that no doubt can be entertained but that the present case is one which well deserved the consideration of this court as at present constituted, and for this reason, if for no other, that it is a question of a nature liable to be constantly occurring; and it is quite possible that one commissi^qner might have one view upon the subject, and another another: therefore, it being a case of such very general application, the court ought to be constituted as it at present is. It may be material to look at so much of the facts of the bankruptcy as appear. [His lordship then went through the facts as above stated, and continued.] In this state of circumstances, the bankrupt objects that the certificate of the amount of the debt was improperly given, for that it could only be given where protection was refused in consequence of the commission of one of the offences enumerated in section 256; and the question now comes to this, whether, first, the commissioner is authorized to refuse protection where, whatever the conduct of the bankrupt may have been in other respects, he has not been guilty of one of the offences defined in section 256; next, whether, assuming that the commissioner may refuse protection to the bankrupt, on other grounds than those mentioned in section 256, that refusal will warrant the granting of the certificate authorized by the 257th section. Looking at this question with all the attention I can command, I own I have arrived at the conclusion that the judgment of the commissioner was correct, and that he was authorized to refuse the protection upon other grounds than those mentioned in section 256; and that the refusal upon this ground was a just reason for the certificate of judgment issuing, and that the bankrupt is now legally in custody. In order to explain the ground upon which I have come to this conclusion, I must refer to some of the earlier sections. First, by section 12 a very large and extended jurisdiction is given to the commissioner; but that is placed under what is thought a sufficient control; it is subject to appeal; the jurisdiction, however, is very extensive — “the court shall have superintendence and control in all matters of bankruptcy,” &c.; “and also in any application for a certificate of conformity,” &c. How is the jurisdiction so given followed out by the subsequent sections? In section 112 the bankrupt is protected from arrest “for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination, until his certificate be allowed, as the court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint.” I do not think that, coupling the 112th with the 12th section, the commissioner is *bound* to give protection in any case; it is always in his discretion — the legislature having given that power to him to be exercised as he may think fit; and if, for instance, the commissioner had reason to suppose that the bankrupt meant to abscond, I think the commissioner would exercise a sound discretion to withhold that protection. Then, section 113 makes the protection available. Then I pass to the 160th section: this refers to the account of the bankrupt; it is to be made out according to the direction of the court. The law gives the commissioner credit for exercising a sound discretion. The commissioner, in the present case, decided

Ex parte Stanton; In re Stanton.

that the balance-sheet was not satisfactory to him, not being accompanied by a cash account. Section 162 gives to the court the power to adjourn the last examination of the bankrupt *sine die*, and to protect the bankrupt from arrest, if he thinks proper to do so, by indorsement on the summons. This shows, therefore, that a discretion is to be exercised by the commissioner, where he adjourns the examination because the account was not satisfactory. In the present case the commissioner did exercise this power under the 162d section, and indorsed protection until the 27th March, 1851. The 198th section relates to the certificate of conformity, and gives the commissioner the fullest discretion as to the allowance, refusal, or suspension of it; and by the 199th, the commissioner, if he allows the certificate, is to certify that the bankrupt has made a full discovery of his estate and effects, and in all things conformed. It is to be observed, that all these sections tend to show a large discretion in the commissioner in giving protection, and that this is not confined to any particular cases; but wherever the commissioner thinks that the conduct of the bankrupt has been such that he ought to be amenable to the common-law rights of the creditors, it is in the power of the commissioner to withhold the protection. Now, there being these several clauses dealing with discretionary protection, at last it comes to certain cases where protection is positively to be withheld, and no discretion is to be in the commissioner; and, under the 256th section, the judicial conclusion that one of the offences therein enumerated has been committed by the bankrupt, makes the withholding of protection positive. Thus the statute gives the bankrupt protection upon the ground of his complying with the requirements of the law, the creditors receiving only, as compensation for that protection from arrest, the obedience of the bankrupt to the statute. Now comes the clause which appears to me was intended to apply to all cases where the commissioner withholds protection, as well in consequence of conduct not capable of being strictly defined, but which by the commissioner may be thought to be improper, as for one of the offences defined in section 256. [His lordship then read section 257, and continued.] When you consider that the power of assenting to or dissenting from the certificate of conformity was taken from the commissioner, and that all common-law remedies are suspended by the bankruptcy, it is not unreasonable, if a bankrupt does not conform to the law, and make a full discovery of his estate and effects, that in such a case, if the commissioner thinks right, some other remedy should be restored to the creditors. This 257th section is in general terms, and it appears to me to be more reasonable to hold it applicable to all the cases in which the commissioner withholds protection, than to the limited cases specified in section 256. I cannot feel myself at liberty to look back to the former state of the law, to form an opinion as to how far these words are to be qualified. I have the act of parliament before me, and it is my duty to construe it as best I can, using the words in their ordinary sense. I do not feel myself at liberty to say, that because I find several instances in which protection is to be refused, it is only on account of refusal for one of those causes that is meant by the general terms of the 257th

Ex parte Stanton; In re Stanton.

section. I do not know that these particular grounds are more important than other grounds which might influence the discretion of the commissioner. I can conceive a bankrupt steering clear of these specified offences, and yet that his examination should be very unsatisfactory to the commissioner. I take, therefore, the language of the clause itself, and I find nothing ambiguous in it. I am asked to travel to section 259; but when I do, I do not see any reason to import the ambiguity of that section into the 257th. There is nothing to control the expressions of section 257, which are free from doubt. It is admitted on all hands that section 259 is badly framed, and that there is great difficulty in giving any construction to it that is perfectly consistent; for the latter part of it professes to be applicable to "persons adjudged bankrupt under this act, and for offences committed after the commencement of this act." Then what is to be done in regard to persons adjudged bankrupt under former acts, and in regard to offences committed previous to the time here mentioned? They are to be prosecuted, in every respect, under the general provisions of this act, except where it is otherwise provided for. There is great difficulty upon this section, but I have arrived at a satisfactory conclusion; and I am of opinion that the words "this enactment," occurring in this section, have no tendency to confine the previous part of that clause to any particular clauses in the prior parts of the act, but to this special clause, and to it only. It says, "he shall not be discharged from such execution until he shall have been in prison for the full period of one year;" and then comes what is to be found in many acts of parliament, namely, that this enactment or this provision shall apply only to certain cases. The word "enactment" does not embrace any particular number of previous clauses. There is nothing peculiar in providing, in this form of words, that they shall only apply to certain cases, or in confining them to the section itself in which they are found, particularly when we have, as here, new matter in the section itself, namely, that a man is to be confined for debt, although that debt may be liquidated. I say that it is a most reasonable construction to hold that this section means that *that* enactment shall have the limited construction here mentioned. I think, therefore, that this clause is capable of a rational construction, and that it cannot be correctly used to introduce any ambiguity into the previous sections. My conclusion therefore is, that wherever the commissioner is authorized to refuse protection, he is authorized also to grant a certificate of the amount of the debt, and that the 256th section only points out some of those instances in which he is to refuse the protection; for I find that he is authorized to refuse protection in other parts of the act. I think, therefore, that the commissioner did right in refusing protection, he being of opinion that the bankrupt had refused to give a proper discovery of his estate and effects.

LORD CRANWORTH, L. J. I entirely concur in the opinion expressed by my Lord Chancellor; and it may seem, therefore, superfluous in me saying any thing upon the subject; but, in a question of this importance, I wish very shortly to state the grounds of my opinion.

Ex parte Stanton; In re Stanton.

The only question is this: whether or not the commissioner was justified in refusing protection; if so, he was bound to grant the certificate in the form in schedule (B a.;) for it is clear, upon the construction of section 257, that in all cases where he is authorized to refuse protection, and does so, the certificate issues as of course. He is acting only ministerially: was he, then, bound to issue it? This depends upon the terms of the 257th section. There is no doubt whatever, that, looking at the mere language of that section, he *was* bound to issue it, for it says — [Here his lordship referred to the section, and continued:] Here the commissioner had refused protection, and the assignees applied for the certificate; so that the very case mentioned in that section had occurred. But then it is said, that although that is the literal construction of these words, yet that when one reads that section with the other sections, there is enough upon the act of parliament to satisfy the court that the *prima facie* meaning of these words is not to be followed, and that the intention of the legislature is to be collected from all these enactments. I cannot arrive at that conclusion. The argument upon that was of this nature: that the legislature had declared, by the 256th section, that whenever a bankrupt shall have committed any one of the offences enumerated in that section, the commissioner shall be bound to refuse the bankrupt protection, or to refuse or suspend his certificate of conformity; and that when, therefore, the legislature, in the next section, says, that when the court shall have refused protection, or refused or suspended the bankrupt's certificate, it must be taken to mean, where such refusal or suspension was on account of the commission of one of the previously enumerated offences; particularly when it is considered that this act of parliament was divided into groups of clauses, and that this particular group related solely to offences. I confess, that argument never had much weight with me; for, in the first place, there is no rule more safe than to construe acts of parliament according to the plain meaning of the words used, unless a manifest absurdity results therefrom. What is there in the 257th section to cut down the generality of its enactment? I can see nothing whatever; but, on the contrary, when we look to the other sections of the act, the legislature will be found to say, that is the very thing we did not mean, namely, to cut down the generality of the 257th section; for under the 201st section it is declared, "that no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void if such bankrupt shall have lost by any sort of gaming," &c. It would be monstrous to assert that that would not be a proper ground to refuse protection; it would be exactly the case where it would be the duty of the commissioner to refuse it; and a refusal of protection on that ground would bring it within the terms of the 257th section. But then it is said, in consequence of an observation which fell from Lord Justice Knight Bruce, that because the 257th section speaks of the refusal of "*further*" protection, and the 256th section is the only other section where the word "*further*" occurs, the legislature was, in the 257th section, speaking of a particular refusal of protection, and that therefore it meant the refusal upon the grounds mentioned in that

Ex parte Stanton ; In re Stanton.

section, (the 256th,) where alone this *particular* refusal, or adjunct "further," occurs. But I do not think that this peculiarity of phrase controls, in this manner, the general enactment; for although the expression "refuse further protection" does not occur in the previous sections, yet in the 162d section it is enacted, that, if at the last examination of the bankrupt the commissioner should adjourn the examination *sine die*, the bankrupt shall be free from arrest for such time (if any) as the commissioner should think fit to indorse upon the summons; but if the commissioner does not indorse any time upon the summons, that is substantially *refusing* protection. In what case is it that the 257th section says that the commissioner shall issue the certificate of judgment? Where he has previously refused further protection, or refused or suspended the certificate of conformity. Now, these are acts clearly referred to in previous sections. In section 198, which relates to the granting of the certificate of conformity, power is given to the commissioner to refuse or suspend the allowance thereof. There is nothing, therefore, which can connect section 257 with section 256, where the certificate of judgment is applied for only on the ground of the refusal or suspension of the certificate of conformity. These were the two arguments raised on the 256th and 257th sections, but the main argument has been rested on the 259th section; and though, as the Lord Chancellor has observed, there is a degree of ambiguity about it, yet I think I see my way to a rational construction, and that the objection raised upon it cannot control the construction of the two previous sections. I construe the words "this enactment" as if they had been "this clause." Can the words "this enactment" refer to the whole of the enactments in this group? If so, it would amount to a legislative declaration of impunity for all offences against the bankrupt law which might be committed for six months. This appears to me an unanswerable argument. Another argument founded on these words was, that they might mean all that was *new*. It would be a most arbitrary mode of argument to say that these words, "this enactment," shall not refer merely to the last antecedent, but we will pick out four or five clauses without there being any thing particular to connect them, and we will refer those words as if they were applicable to those, and those only. It is, besides, a fallacy to speak of one part of the act being more *new* than another: the whole is new; all the previous acts were repealed. For these reasons, I cannot connect the 259th section with the whole act. I construe it by itself.

KNIGHT BRUCE, L. J. As a majority of the court have agreed upon a particular construction of this act of parliament, it would be of no importance, were I to say that I dissent from the rest of the court. Considering the great and obvious ambiguities which unfortunately pervade this act of parliament in so many instances, it would not be a matter for wonder had I dissented from the other members of the court. But to say that I dissent, would be to represent too highly the condition of my mind. I do not dissent—I only doubt; and perhaps I shall never cease to doubt. The grounds for this doubt, or

CASES IN BANKRUPTCY, 1851.

Ex parte Stanton; In re Stanton.

293

the main grounds for it, I will state in few words. First—tions 256, 257, 258, and 259 standing together: they are w in this sense, that there were no provisions similar to them of this country previously. But there are in the same statute immediately preceding and immediately following this new matterments which, with a very slight variation, were the law of this before this statute; and for that reason, but not alone for that I think that the four sections containing the new matter ought considered as one entire and undivided provision, of which every is dependent upon the rest, and to be construed with the rest. 256th section provides that, in certain cases, the court, without exercising any option or discretion whatever, shall refuse any further protection to the bankrupt, or refuse or suspend the certificate of conformity. It then proceeds to enumerate with particularity the cases in which the court was so to refuse protection, or refuse or suspend the certificate. These are not the only punishable offences against the bankrupt law, but only the particular offences that were to be considered without or beyond the discretion of the commissioner. Then the 257th section provides, that when the court shall have refused further protection, or refused or suspended the certificate of conformity, the court *shall*, not *may*, grant a certificate of judgment. My doubt, upon this and other grounds, is, whether the compulsory clauses are not to be taken together, and whether the commissioner could grant a certificate of judgment, except in a case where it was obligatory upon him to refuse protection, or refuse or suspend the certificate of conformity. It is not necessary for me to enter into any further observations. I merely make these remarks as entertaining a doubt, which probably I may ever entertain; but I say again, that to represent my mind as really one of dissent, would be placing it much too high.

Motion refused.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHE-
QUER CHAMBER,

DURING THE YEARS 1851-52.

REGINA v. CHICHESTER.¹

November 24, 1851.

Indictment for Nuisance — Judgment by Default — Sentence not to be pronounced on Defendant when Absent.

Defendant had suffered judgment by default on an indictment for a nuisance to a navigable river:—

Held, that the court could not in his absence give judgment that the nuisance be abated.

INDICTMENT for a nuisance to the river Torridge, in the county of Devon, by erecting a weir in it. The prosecution was instituted by the Admiralty, and the defendant had suffered judgment by default, and judgment had been entered. Notice had been served at the defendant's residence, that application would be made to the court for judgment against him; but the defendant kept out of the way.

Crowder now prayed the judgment of the court.

[LORD CAMPBELL, C. J. The defendant is now in the same situation as if he had been convicted by a jury; but could the court in that case pass sentence upon him in his absence?]

Though the defendant is not present in court, the court may give judgment that the nuisance be abated. A *capias* might issue, but that would cause serious delay in a case where the navigation of a river is affected.

¹ 15 Jur. 1181.

Regina v. The Justices of the West Riding of Yorkshire.

LORD CAMPBELL, C. J. In the absence of the defendant we cannot interfere by way of judgment that the nuisance should be abated: there would be no difficulty in proceeding by outlawry. A common nuisance may be removed; but we cannot, *ex parte*, give our judgment that this is such a nuisance.

PATTESON and EARLE, JJ.,¹ concurred.

REGINA V. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE; *Re*
SPOTLAND V. HALIFAX.²

Bail Court, November 24, 1851.

Mandamus — Notice of Appeal — Application for Copy of Depositions — 11 & 12 Vict. c. 31, s. 9.

Upon an appeal against an order of justices, it became necessary to prove an application for a copy of depositions, under the 11 & 12 Vict. c. 31, s. 9. The only application which had been made was by a letter, which was not produced, and no steps had been taken in order to let in secondary evidence of its contents. The copies of the depositions were themselves produced, and shown to have been sent in a letter by the magistrates' clerk:—

Held, that the Quarter Sessions were right in refusing to act upon parol evidence of that application.

THIS was a rule calling upon the justices of the West Riding of Yorkshire to show cause why a *mandamus* should not issue, commanding them to enter continuances, and hear and determine an appeal against an order of two of the said justices, touching the maintenance of a pauper lunatic. On the 27th April, 1851, the order in question had been received, through the post-office, by the overseers of the township of Spotland, (the appellants,) from the overseers of the township of Halifax, (the respondents.) On the 12th May a letter, applying for a copy of the depositions or examinations taken before the justices, was written and sent through the post, by the appellants, to the clerk to the justices by whom the order purported to have been made. This was addressed "To the Clerk, to John Rhodes Ralph and William Haigh, Esqrs., two of her Majesty's justices of the peace for the West Riding of the county of York, at Halifax, in the said riding." In the usual course of the post the letter would be delivered to the clerk to the justices at Halifax on the following day. On the 15th May an answer, dated May 14, 1851, was received from the clerk to the said justices, inclosing copies of certain documents, purporting to be the examinations of the witnesses taken before the justices on the 26th April, the day of the date of the order.

¹ COLERIDGE, J., was absent on account of indisposition. WIGHTMAN, J., was at the Sittings in London.

² 15 Jur. 1182.

Regina v. The Justices of the West Riding of Yorkshire.

A written notice of appeal was then, on the 24th May, served upon the overseers of Halifax, and fourteen clear days before the commencement of the sessions the grounds of appeal had also been served and the appeal entered. Upon its being called on, the appellants were required to put themselves in court, by proving a due notice of appeal; whereupon a witness deposed to the above facts, but the letter applying for the depositions was not produced; the documents which were received in reply to that letter were, however, produced to the court, but were not read or tendered in evidence. It was then objected, on the part of the respondents, that the letter by which the application for a copy of the depositions was said to have been made ought to be produced to the court, and that the clerk to the justices, the person to whom it was addressed, should have been served with a subpoena to produce the same; and that as it appeared that such application was in writing, no other evidence could be given of it, unless it were shown to have been lost or destroyed. The court of quarter sessions held this to be a valid objection, and ordered the appeal to be struck out, stating that they were not satisfied that there was, in fact, any application for the depositions; and that as no notice of appeal had been given by the appellants within twenty-one days after the order had been received by them, and no application for the depositions was proved to have been made, the appellants had not brought themselves within the terms of the 11 & 12 Vict. c. 31.¹

Pashley and Pickering now showed cause. The sessions had decided a question of fact, viz. whether they had sufficient proof before them that the notice of appeal had been given within the time allowed by law; and their decision was final. *Regina v. The Justices of Kesteven*, 3 Q. B. 810; *Regina v. The Justices of Flintshire*, 4 Dowl. & L. 644.

[WIGHTMAN, J. Suppose the decision had been upon the legality of the evidence, and they had said, "We are not satisfied there is any legal evidence," would not this court then have jurisdiction to review that decision?]

It is different if the parties, being agreed upon facts, ask for the opinion of the quarter sessions upon a point of law; but in this case the court cannot interfere, as the sessions, being both judge and jury, had, in the latter capacity, decided that no application had been made for the depositions. *Regina v. The Justices of Somersetshire*, 4 Dowl.

¹ By section 9 it is enacted, "that no appeal shall be allowed against any order of removal, if notice of such appeal be not given, as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal; but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days."

Regina v. The Justices of the West Riding of Yorkshire.

& L. 741. *Rex v. The Justices of Cumberland*, 4 Ad. & El. 695, might be considered an authority for the other side; but that case had been overruled by *Regina v. The Deputies of the Freeman of Leicester*, 15 Q. B. 671. This was not like a case of justices declining jurisdiction, where, if they had come to a wrong decision, the court would interfere. It was necessary that notice of appeal should be given within twenty-one days after receipt of the order appealed against, unless within that period an application for the depositions had been made. The justices had decided the fact that there was not sufficient proof of such an application. The court, therefore, would not interpose to compel them to rehear evidence of a fact upon which they had already come to a decision. *Rex v. Carnarvon*, 4 B. & A. 86.

Crompton and Overend, contra. The sessions seemed to have thought that they were not at liberty to infer, from the documents produced and from the surrounding circumstances, that an application had, in fact, been made. They did not decide whether there had been an application or not, but merely that a preliminary document was not produced; and in *Regina v. The Deputies of the Freeman of Leicester* it was held, that the deputies having erroneously decided in one case that personal service was a preliminary to exercising their jurisdiction, what they had done was a refusal to exercise that jurisdiction, and the rule for a *mandamus* was made absolute. But in the other case put, the deputies had exercised their jurisdiction by deciding on the fact whether notice was given or not, and the rule was discharged. In *Regina v. Richards*, 15 Jur. 358; s. c. 3 Eng. Rep. 410, Coleridge, J., said, "There is a well-known distinction between interfering with proceedings in inferior tribunals, where the judge has abstained from entering on the case in consequence of a wrong decision upon some preliminary matter, and where he has actually heard and decided the question." The witness called proved that the documents came in a letter to him, and produced them to the court.

[WIGHTMAN, J. Suppose that no evidence had been offered of any application, but simply the documents had been produced?]

That would be sufficient evidence of an application, for the documents could not come of themselves, and it would not be the duty of the clerk to give them unless they were applied for. Although a letter was written, yet the application was a fact, and parol evidence ought to have been received of it. Nothing turns upon what was in that letter. Something was written to the clerk of the justices, put into the post, and two days after, in the course of the post, a letter is received containing certain documents. What was in the first letter must be quite immaterial. The sessions decided, that as the application was in writing, the letter was the best evidence, and confined the appellants to the proof of that, thereby in effect saying they could not receive any other but written evidence.

WIGHTMAN, J. I do not think it necessary to determine what are the precise circumstances under which the court will interfere by *mandamus*. In the present case, in order to excuse the want

Ex parte Stanton; In re Stanton.

signed the following certificate: ". . . . Upon the said bankrupt being examined, it appeared to me that the bankrupt had not filed any stock account or proper cash account with his balance-sheet; whereupon I did adjourn the last examination of the said bankrupt until Thursday, the 20th February next," &c. On the 20th February, 1851, the bankrupt was again examined before Mr. Commissioner Evans, when the commissioner signed the following certificate: ". . . . The said bankrupt being examined, it appeared to me that the said William Stanton had not filed any stock account, nor any special cash account, particularly as to the deficiency of 341*l.* 17*s.* 6*d.* referred to in his balance-sheet, and that his balance-sheet was not satisfactory; whereupon I did adjourn the last examination of the said bankrupt *sine die*, with protection until the 27th day of March next." On the 13th October, 1851, the bankrupt appeared before the commissioner, in answer to a warrant, to show cause why he had not filed a stock account and cash account, as required by his assignees; and he stated that he had not filed such stock account and cash account as required, not being able to furnish such account. The commissioner thereupon made the certificate complained of in the notice of motion, declaring that the assignees of the bankrupt were creditors to the amount of 1207*l.* 12*s.* 5*d.* and refusing the bankrupt protection in the form in Schedule (B a.) to the act 12 and 13 Vict. c. 106. The bankrupt was arrested on the 21st October, 1851, by virtue of a writ of execution issued upon such certificate. See sect. 257 of stat. 12 and 13 Vict. c. 106, in note. On the 24th November, 1851, the bankrupt moved before the commissioner that his certificate of the 13th October might be set aside, and that the bankrupt might be discharged out of custody; and the commissioner refused the motion. The present motion was an appeal from that decision. The question turned upon what was the true construction of sect. 257 of the 12 and 13 Vict. c. 106, taken in connection with sects. 256 and 259. The Lords Justices of the Court of Appeal having been unable to come to an unanimous opinion upon the question, it was now urged before the full court.¹ The bankrupt, in an affida-

¹ The sections of the act which were chiefly referred to in the argument will be found in the 39th group or division of sections; that division is headed, "And with respect to offences against the law relating to bankruptcy and other matters in this act, be it enacted," and contained sects. 251 to 275 inclusive.

The 256th section was, so far as is necessary to state, in these words: "That if, at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the court that the bankrupt has committed any of the offences hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest; and if, at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." The section then enumerated nine classes of offences; but it was admitted by the counsel for the assignees, that the not keeping a stock account by the bankrupt was not an offence within either of those classes, there being no proof that this omission was done wilfully, and with an intent to conceal the true state of his affairs.

The 257th section, after declaring that the assignees shall be deemed judgment cre-

Ex parte Stanton; In re Stanton.

vit in support of the present motion, stated that he did not keep either a stock-book or a cash-book, not being aware of the necessity of so doing, and that he was therefore unable to comply with the requisition of his said assignees, but that he gave them the best account he was able to do respecting his stock and cash transactions.

C. P. Cooper and Simpson, in support of the motion, contended that the only cases in which the commissioner could, under the 257th section, grant a *judgment certificate*, were those where the commissioner had refused further protection, or refused or suspended the certificate, under the 256th section, in consequence of it appearing to the court that the bankrupt had committed some one of the offences therein enumerated; and that it never could have been intended, that in every case where protection was refused a *judgment certificate* should issue, and thereby empower a creditor who had proved his debt to do that which is so inconsistent with the bankrupt law—namely, to come in under the bankruptcy, and also to arrest the bankrupt: that it was clear, from the 259th section, that it was speaking of imprisonment under the new penal enactments of the 256th and 257th sections; otherwise what would have been the sense of postponing the taking effect of that which was old law for a period of six months? and why should the bankrupt be kept in prison for a year, even after payment of his debts, unless as a *punishment*? but that, under this section, if every creditor was paid in full, still he must remain in prison, except by order of the court: that the only place where the words “be it enacted” occurred was in the in-

ditors of the bankrupt for the whole amount due to his creditors, and each creditor a judgment creditor for his amount of proof, proceeds: “And the court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the court, in the form contained in schedule (B a.) to this act annexed; and every such certificate shall have the effect of a judgment entered up in one of her Majesty’s superior courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior courts to make such orders and rules in that behalf as to them shall seem fit: provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance: provided also, that no execution by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt, after the allowance of his certificate of conformity.”

Sect. 259: “That if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the court: provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and then only against such persons as shall have been adjudged bankrupt under this act, and for offences committed after the commencement of this act.”

Regina v. Gaskell.

said statute. If the court should be of that opinion, the rate is to be amended, by striking out of it so much as relates to the assessment of the Portico; but if the court should be of opinion that the Portico ought not to be exempted, then the rate is to stand confirmed.

Pashley, for the respondents. This case is within *Reg. v. Brandt*, 15 Jur. 223; s. c. 3 Eng. Rep. 323, where the Manchester Concert Hall was held not exempt from rates. The question arose in *Reg. v. Phillips*, 8 Q. B. 745, 754; 12 Jur. 431, 432, which was the case of *The Birmingham News-room*, and the court expressed a strong opinion against the exemption, but the case went off upon the want of the certificate of the barrister. The use of the library is confined to the members of the institution, and therefore the institution cannot be said to be for the promotion of the purposes of literature. In *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868; 13 Jur. 357, the society, which was held to be exempt, was instituted for the establishment of a library, in which books and periodicals only were taken in, and any person might become a subscriber, and the benefits of the institution were extended to certain other persons on other terms. In *The Earl of Clarendon v. The Rector and Vestry of St. James's, Westminster*, 15 Jur. 492, where the London Library was held ratable on the ground that part of it was let off, the court of common pleas seem not to have approved of the decision in *The Churchwardens of Birmingham v. Shaw*, though they felt bound by it.

T. Jones, contra. In *Reg. v. Brandt*, 15 Jur. 223; s. c. 3 Eng. Rep. 323, it was apparent on the face of the rules that the object of the institution was social intercourse. A library may properly include magazines and newspapers: much of the information given in newspapers promotes literature and the fine arts.

[COLERIDGE, J. Would an institution in which newspapers only were taken in be within the meaning of stat. 6 & 7 Vict. c. 36?]

The word "exclusively" refers to the principal and primary object of the institution.

[COLERIDGE, J. Suppose there were two rooms, one a library, and the other a news-room, which would be the primary object of the institution?]

If they were severed, the news-room might, perhaps, be liable to rates; but in this institution they are united.

[COLERIDGE, J. There is nothing to show whether the news-room was superadded to the library, or *vice versa*.]

[LORD CAMPBELL, C. J. The library is confined to the use of the 400 subscribers. I am not prepared to say that such a library is exempt. In the case of the Birmingham Library, *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868; 13 Jur. 357, by rule 4 any person might have the use of the books on payment of 6s. 6d. per quarter, upon depositing the value of the book taken out of the library, or upon recommendation from a subscriber. This institution is exclusive: there is a great difference between an institution which admits all persons, and one which is confined to a few. Many per-

sons cannot avail themselves of the benefit of this institution with the aid either of money or character. In *The Earl of Clarendon v. The Churchwardens of St. James's, Westminster*, 15 Jur. 492; s. c. 5 Eng. Rep. 393, the court of common pleas recognize *The Churchwardens of Birmingham v. Shaw*, but do not say that they would hold such an institution to be exempt if it was confined to 400 members.]

Stat. 6 & 7 Vict. c. 36, imposes only four conditions to the exemption from rates: the court is now about to impose a fifth condition, viz., that the public should have access to the institution: that is not a condition expressed in the statute, or involved in the requisition, that the society should be "instituted for purposes of science, literature, or the fine arts exclusively."

Pashley was not heard in reply.

LORD CAMPBELL, C. J. We need not trouble Mr. Pashley to reply. It is quite clear that this is not a society "instituted for purposes of science, literature, or the fine arts exclusively," within the meaning of stat. 6 & 7 Vict. c. 36. It would be very strange if the legislature had passed an act which would exempt such an institution from a liability to contribute to the relief of the poor; because it must be borne in mind, that wherever the exemption can be established, it throws upon the parish, and upon some persons in it who may be not well able to bear it, the burthen of paying a rate to contribute towards the support of the institution. I do not think that such an imputation can be cast upon the legislature with respect to this statute; but that, if properly construed, it may lead to beneficial consequences. The preamble is—"Whereas it is expedient that societies established exclusively for purposes of science, literature, or the fine arts, should be exempt from the charge of county, borough, parochial, and other local rates, in respect of land and buildings occupied by them for the transaction of their business, and for carrying into effect their purposes." But what is this society? If we were to hold that the Portico in Manchester is exempted, there is hardly a club in Pall-mall or in St. James's street that might not claim a similar exemption, for I believe all these clubs have libraries for the use of the members. In this institution there is a library, but it is only for the use of the members; and there is a news-room, and that also is only for the use of the members, in which room are provided not only newspapers, which now contain valuable literature, but there are reports of the markets, and advertisements of sales, and various facilities for carrying on commercial business. Now, can we say that this is a society established exclusively for the purposes of science, literature, or the fine arts? It has nothing to do with the fine arts or with science. Is it for the purpose of the general literature of the country? It is for the private convenience of the 400 subscribers, and for them only. Where there is a public library, really and *bonâ fide* established for the public good, and for the advancement of literature, it may be entitled to exemption; but it is impossible, when we look to the purposes for which this society is established, to say that it is in-

Regina v. Gaskell.

stituted exclusively for the purposes of science, literature, or the fine arts. In *Reg. v. Brandt*, 15 Jur. 223; s. c. 3 Eng. Rep. 323, we said, "We must see whether the promotion of science, literature, or the fine arts be the primary object of the members," or whether the primary object is the convenience and amusement or relaxation of the members. If the latter is the case, it does not come within the exemption of the act; it ought to be rated, and the members ought to contribute with their fellow subjects to all the public burthens attached to property.

PATTESON, J. Independently of any cases, I should certainly have thought that this institution was not, within the words of stat. 6 & 7 Vict. c. 36, a society "instituted for purposes of science, literature, or the fine arts exclusively." It is more in the nature of a club which the members subscribe to for their own convenience: they have a reading-room and a news-room, and pamphlets and newspapers, and other periodical publications are taken in, and they have also a considerable library. I was at first rather puzzled to see whether this was distinguishable from the case of the Royal Manchester Institution. *Reg. v. The Overseers of Manchester*, 15 Jur. 219; s. c. 3 Eng. Rep. 314. In that case there was a large library, and lectures on literary and scientific subjects were given, to which strangers were admitted gratuitously; and it was expressly established for the promotion of science, literature, and the fine arts. In the present case the use of the library is confined entirely to the subscribers for their own benefit and enjoyment. It is more within the case of the Manchester Concert Hall, *Reg. v. Brandt*, 15 Jur. 223; s. c. 3 Eng. Rep. 323, where it was laid down that the institution must be not merely a place for the amusement and gratification of those who choose to subscribe, but for some further and more extensive purposes also. The case of *The Earl of Clarendon v. The Churchwardens of St. James's, Westminster*, 15 Jur. 492; s. c. 5 Eng. Rep. 393, seems more like *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868; 13 Jur. 357; but it was decided upon another point, that the society, which was the London Library, had underlet a portion of their premises; though the court said that they should have felt themselves bound by the decision of this court to hold that it was within the statute. The decision in that case, therefore, does not stand in the way of our deciding according to the real meaning of the statute, which is, that the society must be not merely for the amusement of the parties who subscribe, but also for the purposes of promoting science, literature, or the fine arts. This society is not of that description, and therefore is not within the act, and consequently is ratable.

COLERIDGE, J. To bring the case within stat. 6 & 7 Vict. c. 36, to which we ought to give, if we can, a reasonable construction, there must be a society, and that society must be instituted exclusively for the purposes stated in the act, or one of them, viz., science, literature, or the fine arts. It is not enough for two or more persons to agree together to have a common library or news-room, or a place where

Regina v. The Mayor and Assessors of Hartlepool.

they may cultivate natural history or any of the sciences; and the number of persons who so agree cannot make any difference in the principle. There must be a society, and it must have the purposes which I have stated. In this institution a certain number of persons, for their own convenience and for their own improvement, have agreed to occupy a building, which has three parts—a library, a reading-room, and a news-room. There is nothing to distinguish one object from the other as the primary object. It seems to me a violence to common sense to say that these persons constitute a society for the purpose of advancing literature or any thing else exclusively. The result may be, that the shareholders may become better informed in science, literature, or the fine arts; but that will not make them a society “instituted for purposes of science, literature, or the fine arts exclusively.”

Judgment for respondents.

REGINA v. THE MAYOR AND ASSESSORS OF HARTLEPOOL.¹

Bail Court, November 14 and 25, 1851.

Burgess List—5 & 6 Will. 4, c. 76, § 17.

D.'s name being accidentally omitted from the burgess list of the borough of H., he sent in a notice under the 5 & 6 Will. 4, c. 76, § 17, claiming to have his name inserted. He had signed this notice, “A. W. Dobing,” and did not attend the revision of the list to substantiate his claim. The mayor and assessors refused to insert his name in the list, upon the ground that they could not place it there with initials only for the christian name, nor under the circumstances, with the christian name in full, although it was proved to them that he was entitled to have his name inserted, and that there was no other person of a similar name in the borough; and it also appeared that “A. W.” meant “Anthony Wilson:”—

Held, that the mayor and assessors would have been justified in placing his name upon the list, and the court would now order it to be done.

THIS was a rule calling upon the mayor and assessors of Hartlepool to show cause why a *mandamus* should not issue, commanding them to put on the burgess roll of the present year the name of Anthony Wilson Dobing. It appeared that the assistant overseer, in making out the burgess list, had omitted to insert such name; whereupon a claim was sent in, signed “A. W. Dobing.” Upon the revision day Dobing was not in attendance, but the assistant overseer stated that his name had been accidentally omitted, and that he was duly qualified. It was also shown that the name of Anthony Wilson Dobing was on the rate-books, that there was no other person of that name in the borough, and that it was commonly understood that “A. W. Dobing” meant “Anthony Wilson Dobing.” The mayor and assessors, however, thought that they ought not to put a burgess on the roll by his initials only, and that in the absence of the claimant, they

¹ 15 Jur. 1158; 21 Law J. Rep. (N. S.) Q. B. 71.

Regina v. The Mayor and Assessors of Hartlepool.

were not warranted in inferring that "A. W." meant "Anthony Wilson." They therefore disallowed the claim.

November 14. *Cole*, in moving for the rule, asked for a peremptory *mandamus* in the first instance, and cited *Regina v. The Mayor of Dover*, 11 Q. B. 260, where a party applied to have his name inserted in the burgess roll under the 7 Will. 4 and 1 Vict. c. 78, § 24; and Lord Denman expressed a doubt whether, if the court was satisfied of his title upon affidavit, they ought not to award a peremptory *mandamus* in the first instance. But Erle, J., stated that such was not the practice of the Crown-office, and the statute did not authorize a peremptory *mandamus*. He therefore granted a rule *nisi* only.

November 25. *Cleasby* now showed cause. The mayor was not bound to insert upon the burgess roll a name with initials only, although it might have been different if the party had attended and explained what his name really was.

[ERLE, J. Does this inquiry raise any question under the Municipal Corporation Act, which directs that, in certain proceedings and forms, it shall be sufficient if the name of a person or place is so expressed as to be understood?]

That would be one question.

[ERLE, J. The law provides that any party aggrieved may come to this court in order to have his name placed upon the roll; and as it is now clearly established that "A. W." means Anthony Wilson, surely I may order that name to be inserted.]

The court will not order the name to be inserted unless it ought to have been so at the time the mayor rejected it. The question was not whether the description given was such as would identify the person, but whether it was (so far as the name was concerned) such a description as would indicate both the christian and surname. It had been held, that the form of the claim given in Schedule (D.) of the 5 & 6 Will. 4, c. 76, must be strictly complied with. *Regina v. The Mayor and Assessors of Kidderminster*, 20 Law J. Rep. (N. S.) Q. B. 281; s. c. 4 Eng. Rep. 248.

[ERLE, J. Would "Thos." do?]

That is merely another way of spelling Thomas.

Cole, in support of the rule, was not called upon.

ERLE, J. The intention of the legislature was, that parties having a right should exercise that right. I think that A. W. Dobing being clearly understood in Hartlepool to mean Anthony Wilson Dobing, and nobody else, and there being information before the mayor that "A. W." stood for Anthony Wilson, he would have been justified in putting Anthony Wilson Dobing on the roll of burgesses. That person having now applied to me, I place myself in the position of the mayor, and order the claimant's name to be inserted on the roll.

Rule absolute.

*Ruffey v. Henderson.***RUFFEY v. HENDERSON.¹**

November 15, 1851.

Landlord and Tenant — Parol License to enter Premises after Expiration of Tenancy — Trover — Fixtures.

The declaration stated that the plaintiff had been tenant to one B, and during his tenancy had put up certain fixtures; that before the expiration of the tenancy B granted to the plaintiff leave and license to keep the said fixtures on the premises after the expiration of the tenancy, in order that he might sell them to the incoming tenant, and to enter and recover them if such tenant would not purchase them; that the defendant subsequently became tenant; that he would neither purchase the fixtures nor allow the plaintiff to enter and remove them. The plaintiff traversed that B granted such license to the plaintiff. At the trial, the plaintiff gave in evidence the following letter written to him by B's attorney: "Mr. B has no objection to your leaving the fixtures on the premises and making the best terms with the incoming tenant":—

Held, that this document, if it gave a license at all, gave one coupled with an interest in land; and that therefore, not being under seal, it could not be enforced against the incoming tenant.

Trover will not lie for fixtures which a tenant has left annexed to the freehold after he has quitted possession, with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant.

THE declaration stated, that before the committing of the grievances by the defendant hereinafter mentioned, the plaintiff had held and enjoyed a certain messuage and premises, as tenant thereof to one John Bowler, for a certain term, to wit, a term of twenty-one years from the 20th September, 1829, and which had before then expired; and the said John Bowler, being the owner of the said messuage and premises, had, before the expiration of the said tenancy, to wit, on &c., for and in consideration of a certain sum of money, to wit, 30*l.*, paid by the plaintiff to the said John Bowler for the same, bargained, sold, and transferred unto the plaintiff divers and very many personal chattels of and belonging to the said John Bowler, fixed and fastened to the said messuage and premises, to wit, &c.; and the said chattels, so fixed and fastened as aforesaid, being of the value, to wit, of 50*l.* thereupon then became and were, and from thence hitherto have been, and still are the chattels and fixtures of the said plaintiff: that before &c., and after the plaintiff became such tenant as aforesaid, to wit, on &c., one Thomas Osborne, being possessed of divers and very many other personal chattels, his property, fixed and fastened to the said messuage and premises, to wit, chattels of the like number, quantity, quality, description, and value as those hereinbefore mentioned, and being entitled to detach and remove the same from and off the said messuage and premises, or to sell and transfer the same to the plaintiff, did, to wit, on &c., with the assent and privity of the said John Bowler, bargain, sell, and transfer the same to the plaintiff, and thereupon the same then became and were and still are the chattels and fixtures of the plaintiff: that before &c., and during the continuance of the said tenancy, the plaintiff, being possessed of divers personal

¹ 16 Jur. 84; 21 Law J. Rep. (N. S.) Q. B. 49.

Raffey v. Henderson.

chattels, to wit, of the like number, quantity, quality, description, and value as those hereinbefore first mentioned, had put up and fixed and fastened the same in, to, and upon the said messuage and premises for the ornament of the said messuage and premises, and for domestic purposes, and for his more convenient use and enjoyment of the said messuage and premises, and the same was respectively so put up, fixed, and fastened that the same could and might be detached and removed from and off and out of the said messuage and premises without causing or doing any material injury or damage to the said messuage and premises; and the plaintiff, after he had so put up, fixed, and fastened the said chattels, was of right entitled to detach and remove the same from and off and out of the said messuage and premises during the said tenancy; and the said chattels, so put up, fixed, and fastened as aforesaid, afterwards, and during the said tenancy, continued to be and were used and enjoyed by the plaintiff for domestic purposes, and for his more convenient use and enjoyment of the said messuage and premises, and the same, for and during all the time aforesaid, were and still are the chattels and fixtures of the plaintiff: that whilst the plaintiff was such tenant, and before the expiration of the said term, and before the committing of &c., to wit, on &c., the said John Bowler gave and granted unto the said plaintiff leave and license to keep and continue the said several chattels and fixtures so respectively put up, fixed, and fastened, as first afterwards aforesaid, in, to, and upon the said messuage and premises, after the expiration of the said tenancy, in order and for the purpose that he might sell and dispose of the same to the person who should next after the expiration of the said tenancy, become tenant to the said John Bowler of the said messuage and premises, and to enter upon the said messuage and premises, and detach and remove the said chattels and fixtures from the same in case such tenant would not purchase the same of the plaintiff: that the plaintiff, before &c., in pursuance of the said leave and license, and acting upon the same, did not, before or at the expiration of his said tenancy, or at any time since, detach or remove the said chattels and fixtures from the said messuage and premises, and from thence, until the committing of &c., suffered and permitted to remain, and kept and continued the said chattels and fixtures so fixed and fastened as aforesaid upon the said messuage and premises for the purpose aforesaid; and the said John Bowler never at any time revoked or countermanded the said leave and license: that before &c., and after the said term and tenancy had expired, to wit, on &c., the defendant became and was tenant to the said John Bowler of the said messuage and premises, and he was the next tenant to the said John Bowler of the said messuage and premises after the expiration of the plaintiff's said tenancy; and for and during all the time aforesaid, and hitherto, the said chattels and fixtures were and still are the chattels and fixtures of the plaintiff; and thereupon, the defendant having notice of the premises, the plaintiff afterwards, and within a reasonable time in that behalf, applied to and requested of the defendant to purchase the said chattels and fixtures of the plaintiff, but the defendant wholly and absolutely refused then or at any other time so to do; and

Ruffey v. Henderson.

thereupon, afterwards, and within a reasonable and proper time in that behalf, and at a reasonable and proper time of the day, to wit, on &c., the plaintiff requested of the defendant, then being in the possession of the said messuage and premises, to suffer and permit the plaintiff to enter into and upon the same for the purpose of his detaching and removing the said chattels and fixtures from and off the said messuage and premises, and the plaintiff would have entered into and upon the said messuage and premises for that purpose, and would in a reasonable and proper time have detached and removed the said chattels and fixtures from and off the said messuage and premises, had the defendant suffered and permitted him to do so, but the defendant then wholly and absolutely refused to suffer or permit the plaintiff, then or at any other time, so to do, and then obstructed and hindered and prevented the plaintiff from entering into and upon the said messuage and premises for the purpose aforesaid, and from detaching and removing the chattels and fixtures from and off the same, the outer door thereof being then open, and then claimed the right and title to use the said chattels and fixtures as his own for and during his said tenancy, and then and from thence hitherto hindered and prevented the plaintiff from having or using the same, and he himself used the same, and converted and disposed thereof to his own use. There was a count in trover. First plea, except as to certain articles in the second count, not guilty. Second plea, to the first count, that John Bowler did not grant unto the plaintiff the said leave and license in that count mentioned, in manner and form, &c. Third plea, to the second count, except as to the grievances in the first plea excepted, not possessed. Fourth plea, as to the articles excepted, payment of money into court.

On the trial, before Alderson, B., at the Surrey Summer Assizes at Croyden, in 1851, it appeared that the action was brought by the former tenant of the house mentioned in the first count of the declaration, against the present tenant, to recover the value of certain fixtures which remained in the house after the expiration of the tenancy, under the circumstances stated in the first count, the fixtures being of such a description that the tenant could not have removed them after the expiration of the term, as against the landlord. In order to prove the leave and license stated in the declaration, the plaintiff gave in evidence the following letter, written to him by the agent of John Bowler, in answer to an application by him to the landlord to purchase the fixtures:—

“August 31, 1850.

“Sir,— Your letter of the 27th instant, addressed to Mr. Bowler, has been handed to me, with instructions to reply to it. By the terms of your lease, you are bound to leave the premises at the expiration of the term in good repair, and if you do not make the repair before the end of the term, it is quite clear that the premises must remain unoccupied till the repairs are done, and by this course you will at once perceive that Mr. Bowler will be a loser to the extent of the rent which he might otherwise receive. At present there are two parties

Ruffey v. Henderson.

chattels, to wit, of the like number, quantity, quality, description, and value as those hereinbefore first mentioned, had put up and fixed and fastened the same in, to, and upon the said messuage and premises for the ornament of the said messuage and premises, and for domestic purposes, and for his more convenient use and enjoyment of the said messuage and premises, and the same was respectively so put up, fixed, and fastened that the same could and might be detached and removed from and off and out of the said messuage and premises without causing or doing any material injury or damage to the said messuage and premises; and the plaintiff, after he had so put up, fixed, and fastened the said chattels, was of right entitled to detach and remove the same from and off and out of the said messuage and premises during the said tenancy; and the said chattels, so put up, fixed, and fastened as aforesaid, afterwards, and during the said tenancy, continued to be and were used and enjoyed by the plaintiff for domestic purposes, and for his more convenient use and enjoyment of the said messuage and premises, and the same, for and during all the time aforesaid, were and still are the chattels and fixtures of the plaintiff: that whilst the plaintiff was such tenant, and before the expiration of the said term, and before the committing of &c., to wit, on &c., the said John Bowler gave and granted unto the said plaintiff leave and license to keep and continue the said several chattels and fixtures so respectively put up, fixed, and fastened, as first afterwards aforesaid, in, to, and upon the said messuage and premises, after the expiration of the said tenancy, in order and for the purpose that he might sell and dispose of the same to the person who should next after the expiration of the said tenancy, become tenant to the said John Bowler of the said messuage and premises, and to enter upon the said messuage and premises, and detach and remove the said chattels and fixtures from the same in case such tenant would not purchase the same of the plaintiff: that the plaintiff, before &c., in pursuance of the said leave and license, and acting upon the same, did not, before or at the expiration of his said tenancy, or at any time since, detach or remove the said chattels and fixtures from the said messuage and premises, and from thence, until the committing of &c., suffered and permitted to remain, and kept and continued the said chattels and fixtures so fixed and fastened as aforesaid upon the said messuage and premises for the purpose aforesaid; and the said John Bowler never at any time revoked or countermanded the said leave and license: that before &c., and after the said term and tenancy had expired, to wit, on &c., the defendant became and was tenant to the said John Bowler of the said messuage and premises, and he was the next tenant to the said John Bowler of the said messuage and premises after the expiration of the plaintiff's said tenancy; and for and during all the time aforesaid, and hitherto, the said chattels and fixtures were and still are the chattels and fixtures of the plaintiff; and thereupon, the defendant having notice of the premises, the plaintiff afterwards, and within a reasonable time in that behalf, applied to and requested of the defendant to purchase the said chattels and fixtures of the plaintiff, but the defendant wholly and absolutely refused then or at any other time so to do; and

Ruffey v. Handerson.

thereupon, afterwards, and within a reasonable and proper time in that behalf, and at a reasonable and proper time of the day, to wit, on &c., the plaintiff requested of the defendant, then being in the possession of the said messuage and premises, to suffer and permit the plaintiff to enter into and upon the same for the purpose of his detaching and removing the said chattels and fixtures from and off the said messuage and premises, and the plaintiff would have entered into and upon the said messuage and premises for that purpose, and would in a reasonable and proper time have detached and removed the said chattels and fixtures from and off the said messuage and premises, had the defendant suffered and permitted him to do so, but the defendant then wholly and absolutely refused to suffer or permit the plaintiff, then or at any other time, so to do, and then obstructed and hindered and prevented the plaintiff from entering into and upon the said messuage and premises for the purpose aforesaid, and from detaching and removing the chattels and fixtures from and off the same, the outer door thereof being then open, and then claimed the right and title to use the said chattels and fixtures as his own for and during his said tenancy, and then and from thence hitherto hindered and prevented the plaintiff from having or using the same, and he himself used the same, and converted and disposed thereof to his own use. There was a count in trover. First plea, except as to certain articles in the second count, not guilty. Second plea, to the first count, that John Bowler did not grant unto the plaintiff the said leave and license in that count mentioned, in manner and form, &c. Third plea, to the second count, except as to the grievances in the first plea excepted, not possessed. Fourth plea, as to the articles excepted, payment of money into court.

On the trial, before Alderson, B., at the Surrey Summer Assizes at Croyden, in 1851, it appeared that the action was brought by the former tenant of the house mentioned in the first count of the declaration, against the present tenant, to recover the value of certain fixtures which remained in the house after the expiration of the tenancy, under the circumstances stated in the first count, the fixtures being of such a description that the tenant could not have removed them after the expiration of the term, as against the landlord. In order to prove the leave and license stated in the declaration, the plaintiff gave in evidence the following letter, written to him by the agent of John Bowler, in answer to an application by him to the landlord to purchase the fixtures:—

“August 31, 1850.

“Sir,— Your letter of the 27th instant, addressed to Mr. Bowler, has been handed to me, with instructions to reply to it. By the terms of your lease, you are bound to leave the premises at the expiration of the term in good repair, and if you do not make the repair before the end of the term, it is quite clear that the premises must remain unoccupied till the repairs are done, and by this course you will at once perceive that Mr. Bowler will be a loser to the extent of the rent which he might otherwise receive. At present there are two parties

Raffey v. Henderson.

in treaty for a lease, to commence at Michaelmas, and if the premises be not repaired by that time, it is quite clear that manifest injury will be done to Mr. Bowler, who of course must stipulate with his new tenant that the premises be put into a proper state of repair. Mr. Bowler has no intention of purchasing your fixtures, but he has no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant. I am, &c.,

"JAMES BURN."

It was objected for the defendant, first, that a leave and license to remove fixtures must be by deed, and under seal; secondly, that trover would not lie for fixtures. The learned judge left as a question to the jury, whether the plaintiff had applied to the defendant relative to the fixtures within a reasonable time. The jury found that the plaintiff had not so done; and the learned judge nonsuited the plaintiff, leave being reserved to move to enter a verdict for him for 9*l.* 10*s.*, either on the plea of not guilty, or upon the count in trover. In the following Michaelmas Term, November 5,

Shee, Serjeant, moved accordingly, and cited the note to *Elwes v. Mawe*, 2 Smith's L. C. 118, referring to *Penton v. Robart*, 2 East, 88. [LORD CAMPBELL, C. J. We have not now to consider the right, but what is the remedy.]

PATTESON, J. It appears from the case in note (r) to *Green v. Cole*, 2 Wms. Saund. 259 c, 6th ed., that trover will not lie.]

The court granted a rule *nisi*; against which, November 15,

Bramwall and *Lush* showed cause. First, the declaration alleges a leave and license from John Bowler to the plaintiff to continue the fixtures on the premises after the expiration of the tenancy, and to enter upon the premises and remove the fixtures, if the incoming tenant would not purchase them, without any limitation of time. If the letter of John Bowler is taken to mean a license to remove the fixtures within a reasonable time, the jury have found that the plaintiff did not make an application for the purpose within a reasonable time. If it amounts to a general license, it does not prove the issue raised by the second plea, which is, whether there was a valid grant of a license. The license affected to pass an interest in land, and therefore is void, not being under seal. *Wood v. Leadbitter*, 13 M. & W. 838; 9 Jur. 187.

[WIGHTMAN, J. Suppose a lease not under seal, with a clause in it by which the tenant might enter to remove fixtures after the expiration of the tenancy.]

If it amounted to a license, so as to prevent the tenant from being a trespasser, still it might be revoked; and a parol license to enjoy an easement on the land of another is determined, if the grantor transfers his interest in, and possession of, the land to a third person. *Wallis v. Harrison*, 4 M. & W. 538.

Shee, Serjeant, and *Grady*, contra. The allegation in the first count of the declaration was proved.

Raffey v. Henderson.

[WIGHTMAN, J. There must be such a license as can be enforced, otherwise it is no license.]

The interest transferred to and taken by the defendant was subject to the right of the plaintiff. It is sufficient for the maintenance of the action that there should be a permission from the landlord to enter upon the premises to remove the fixtures. They referred to Lord Ellenborough in *Penton v. Robart*, 4 Esp. 33; s. c. in Banc, 2 East, 88; *Davis v. Jones*, 2 B. & Al. 165; *Fairburn v. Eastwood*, 6 M. & W. 679; and *Gregg v. Wells*, 2 Per. & D. 296; 10 Ad. & El. 90; 3 Jur. 555.

[WIGHTMAN, J. In *Weeton v. Woodcock*, 7 M. & W. 14, it was held that the right of the tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.]

That case does not apply to the state of facts now under consideration, where the fixtures remain on the premises by permission of the landlord. In *Hallen v. Runder*, 1 C. M. & R. 266; 3 Tyr. 952, it was held, that where the tenant had waived his right to remove the fixtures during the term, upon an agreement by the landlord to purchase them at a valuation, they ceased to be an interest in land within section 4 of statute 29 Car. 2, c. 3, and he might recover the amount ascertained by the broker in *indebitatus assumpsit*. As to the second count, the word "fixtures" does not, in pleading, necessarily mean things affixed to the freehold; and trover will lie for fixtures. *Sheen v. Rickie*, 5 M. & W. 175; 7 Dowl. 335; *Davis v. Jones*, 2 B. & Al. 165; *West v. Blakeway*, 2 Man. & G. 729; 3 Scott's N. R. 218.

PATTESON, J.¹ The first count of the declaration complains that the defendant obstructed and prevented the plaintiff from entering upon the messuage and removing certain chattels and fixtures which he was entitled to remove from the premises during the term, and which he alleges he had a leave and license from the landlord to remove after the expiration of the term. The plea traverses this license, *modo et formâ*. What was the relation of the parties at the time when the letter was written which is said to constitute the leave and license? The tenancy had not then expired; and the terms of the letter are vague and loose; it does not even say that the plaintiff has the permission of the landlord to remove the fixtures, but only that the landlord had no objection to the plaintiff leaving them on the premises and making the best terms he could with the incoming tenant. At that time, which was before the expiration of the plaintiff's tenancy, the landlord had no right of possession, but only a reversionary interest; therefore the leave and license was entirely prospective; and if so, it must have been given in contemplation of a possession by an incoming tenant, and was intended to bind him, and that is the object of stating it in the declaration. That is something very like an interest in land; at any rate, it professes to give the plaintiff a right

¹ LORD CAMPBELL, C. J., was in the Court of Criminal Appeal.

Ruffey v. Henderson.

to enter upon land; and being intended to bind another person, though it might possibly excuse the plaintiff in an action of trespass for taking these fixtures, or bind the landlord so as to give a right of action against him for not making an agreement with his new tenant that the plaintiff should be allowed to enter and take these fixtures, it is clear, that, as against the defendant, such an interest must be created by deed. The issue raised by the second plea is, whether there was such a leave and license as is meant by the declaration, namely, such as is binding upon the incoming tenant. Therefore I am of opinion that the first count was not proved, and that the defendant is entitled to the verdict on that issue.

As to the count in trover, some of the cases go very near the wind; but the principle is, that where the fixtures are annexed to the freehold, if there is a right to remove them, the tenant must remove them during the term, or before he has quitted possession. But that principle is applicable only where the question as to the right arises between the tenant and his landlord. If they are severed before the expiration of the tenancy, trover will lie; or if they are of such a nature that they never were in law annexed to the freehold, then also trover will lie, because the property in them never passed out of the tenant. In this case no such question is raised. If it had been raised, and the jury had found that the things were not fixtures, the action would have lain, because it is not pretended that the property in these fixtures passed to the defendant. Therefore the doctrine, as to fixtures left upon the premises after the expiration of the tenancy being a gift to the landlord, does not arise. The question here is, as to the nature of the things; and if they are fixtures, an action will not lie until they are severed. The result of the cases is very correctly stated by Williams, J., in note (r) to *Green v. Cole*, 2 Wms. Saund. 259 c. 6th ed.: "However, the law remains unaltered, that until they are severed from the freehold, they are not goods and chattels at all, but parcel of the freehold, and as such are not recoverable in trover." Therefore the plaintiff cannot succeed on the second count.

COLERIDGE, J. As to the construction to be put upon the letter, I think that it does not tie up the landlord's hands, or the hands of the incoming tenant, with respect to the fixtures, after the tenancy of the plaintiff expired. But assuming it to have all the effect supposed, no instrument would effectuate it but one which would bind the land to whomsoever it was let. The plaintiff, for the purpose of this action, requires to have, on any day within a reasonable time, a right to enter the dwelling-house without the leave of the occupier, and remove the fixtures. It is enough to say, that according to the learned judgment in *Wood v. Leadbitter*, 13 M. & W. 838; 9 Jur. 187, an instrument conferring such an interest must be under seal. Mr. Grady argues that the leave and license is no more than a special agreement that the landlord should not take the benefit which he would derive from the laches of the tenant, under the rule of law requiring the removal of fixtures during the term. But then it only gives a right of action against the landlord, not against the incoming tenant.

Regina v. St. Michael's, Pembroke.

WIGHTMAN, J. The question on the first count is, whether the plaintiff had a right in law, as against the defendant, the incoming tenant, to enter the dwelling-house, in order to possess himself of the fixtures which he had left there. When my brother Shee was asked to distinguish this case from *Weeton v. Woodcock*, 7 M. & W. 14, he admitted that that case must be considered as deciding the principle applicable to this case, but he relied on the leave and license as distinguishing this case from that. The question, then, is, whether that gives a right which can be the foundation of this action. The license is merely by parol, and it is not to take effect during the tenancy of the plaintiff, but is to come into operation and be effectual, if at all, during the tenancy of the defendant, who has no knowledge of it. If it may be construed as limited to a reasonable time, it is impossible to say that such a power or easement as that, namely, a right of entry, could pass. It is sufficient to refer to *Wood v. Leadbitter*, 13 M. & W. 838; 9 Jur. 187, and particularly to *Wallis v. Harrison*, 4 M. & W. 538, which seems still more in point, in support of the proposition, that such a right cannot pass by parol: it is, in fact, a transfer of a title paramount. Therefore I am of opinion that the plaintiff is not entitled to succeed on the first count.

As to the second count, which is in trover, the word "fixture" would imply that the thing was annexed to the freehold; though there are fixtures of such a nature that they may be removed by the tenant during his tenancy. But, *prima facie*, fixtures not disannexed from the freehold are not the subject of an action of trover.

Rule discharged.

REGINA v. ST. MICHAEL'S, PEMBROKE.¹

Bail Court, January 30, 1852.

Order of Removal—Abandonment—11 & 12 Vict. c. 31, s. 8.

The effect of a notice of abandonment, under the 11 & 12 Vict. c. 31, s. 8, is to take away all jurisdiction from the Quarter Sessions over the appeal, and to operate as a stay of proceedings, subject to the right of the appellants to costs up to the time of the service of the notice. An appeal was entered and respited at the Easter Sessions, 1850. At the following July Sessions, in consequence of a defect in the grounds of appeal, it was adjourned, at the instance of the appellants, to the subsequent October Sessions. Before, however, the last-mentioned sessions were held, a notice of abandonment was given by the respondent parish, but the appellants, notwithstanding this notice, went to the sessions, and the order was quashed, with costs:—

Held, upon motion to remove the order of sessions into the Court of Queen's Bench, under the 12 & 13 Vict. c. 45, s. 18, that the sessions had no jurisdiction to enter upon an appeal after the notice of abandonment had been served.

A RULE had been obtained calling upon the church-wardens and overseers of the parish of St. Michael, Pembroke, to show cause why

¹ 16 Jur. 87; 21 Law J. Rep. (N. S.) M. C. 79.

Regina v. St. Michael's, Pembroke.

an order made at the quarter sessions for the county of Pembroke, whereby the said churchwardens and overseers were ordered to pay unto the churchwardens and overseers of the parish of Kellymanllwyd, in the county of Carmarthen, 29*l.* 11*s.* 4*d.*, the amount incurred in an appeal between the two parishes above mentioned, should not be removed into this court, so that that the same might be enforced, in pursuance of the 12 and 13 Vict. c. 45, s. 18. The following facts were disclosed upon the affidavits: An appeal against an order of removal had been entered at the Easter Sessions, 1850, and respited. At the subsequent July Sessions, upon an objection being taken to the grounds of appeal, the court ordered an amendment, and adjourned the appeal to the then next sessions in October, 1850. On the 10th October (the last-mentioned sessions being held on the 15th) the respondent served a notice of abandonment of the order appealed against, in pursuance of the 11 and 12 Vict. c. 31, s. 8; but notwithstanding such notice, the appeal was called on at the October Sessions; and although it was objected by the attorney for the respondents, who attended to watch the case, that the appeal could not be entered upon after the notice of abandonment, the sessions quashed the order, with costs, and ordered the respondents to pay 29*l.* 11*s.* 4*d.*, the amount of such costs.

Rose now showed cause. The rule must be discharged, because, first, the sessions proceeded in the appeal and made an order after notice of abandonment; secondly, the costs were taxed after the sessions, and there had been no adjournment; thirdly, the order was bad on the face of it, because it did not direct the costs to be paid to the clerk of the peace. [The last two objections were not gone into.] After service of the notice of abandonment, the sessions had no jurisdiction; and the proper course would have been for the appellants to have gone before the clerk of the peace, and to have taxed their costs without going to the sessions. The effect of the 8th section of the 11 and 12 Vict. c. 31,¹ was to take away all jurisdiction from the ses-

¹ By the 11 and 12 Vict. c. 31, s. 8, it is enacted, "that in any case in which an order shall have been made for the removal of any poor person, and a copy or counterpart thereof sent as by law required, it shall and may be lawful for the overseers or guardians of the parish who shall have obtained such order of removal, *whether any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not*, to abandon such order by notice, in writing, under the hands of such overseers or guardians, or any three or more of such guardians, to be sent by post, or delivered to the overseers or guardians as aforesaid of the parish to which such person is by the said order directed to be removed, and thereupon the said order, and all proceedings consequent thereupon, *shall become and be null and void to all intents and purposes as if the same had not been made*, and shall not be in any way given in evidence in case any other order of removal of the same person shall be obtained: provided always, that in all cases of such abandonment, the overseers or guardians of the parish so abandoning shall pay to the overseers or guardians of the parish to which such person is by the said order directed to be removed the costs which the said last-mentioned overseers or guardians shall have incurred by reason of such order, and of all subsequent proceedings thereon, which costs the proper officer of the court before whom any such appeal (if it had not been abandoned) might have been brought shall, and he is hereby required, upon application, to tax and as-

Regina v. St. Michael's, Pembroke.

sions. After notice of abandonment, an order of removal ceases to exist as an order; and there would be great injustice if the appellants, after such notice, could go to the sessions and get the order quashed, and so prevent the respondents from again moving in the matter, besides compelling them to pay the further costs of the sessions. He was then stopped by the court; and

Pashley, in support of the rule, was heard upon this point. The intention of the statute was to prevent the inconvenience of compelling the respondents to go to the sessions in a case where, after an appeal had been rendered, and the grounds of appeal delivered, they discovered a formal defect in their order. The words of the statute, "whether any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not," cannot be taken to comprise cases in which the appeal has been part heard, and then adjourned upon certain conditions imposed by the sessions; for if they do, the effect of a notice of abandonment served subsequently to such adjournment would be to oust the quarter sessions of all power of enforcing the conditions they had imposed, and of carrying out their views with respect to the appeal. Great inconvenience would arise if the construction contended for by the other side were adopted; for respondents might get their case heard through, and then, if an adjournment took place to the following sessions, they would have it in their power to oust the sessions of all jurisdiction, by giving notice of abandonment. Another answer to this objection was, that, the notice of abandonment having been filed, the sessions must be allowed to deal with the costs. [He also contended, that, as the respondents had appeared by their attorney at the sessions, they were precluded from now objecting to the jurisdiction of that court.]

ERLE, J. It is very clear that the intention of the legislature was, that from the moment notice of abandonment is served, in cases where the matter is in the stage this was, litigation should be at an end, subject to the right of the appellant to get his costs. The construction to be put upon the 8th section of the 11 and 12 Vict. c. 31, is, that where respondents wish to abandon an order, they may do so by giving notice to the other side, in which case neither party shall

certain, at any time, whether the court shall be sitting or not, upon production to him of such notice of abandonment, and upon proof to him that such reasonable notice of taxation, together with a copy of the bill of costs, has been given to the overseers or guardians abandoning such order, as the distance between the parties shall, in his judgment, require; and thereupon the sum allowed for costs, including the usual costs of taxation, which such officer is hereby empowered to charge and receive, shall be indorsed upon the said order of abandonment, and the said notice so indorsed shall be filed among the records of the said court; and if the said costs so allowed be not paid within ten days after such costs shall have been lawfully demanded, the amount thereof may be recovered from such last-mentioned overseers or guardians in the same manner as any penalties or forfeitures are recoverable under the said act of the 4 and 5 Will. 4, c. 76."

Poole v. Pain.

go to the court, but the appellants shall be indemnified as to costs up to the time of the abandonment. As to the other point, even the consent of parties will not support the judgment of a tribunal which has no jurisdiction over the matter adjudicated upon.

Rule discharged.

POOLE v. PAIN & another.¹

Bail Court, November 22, 1851.

Notice of Trial — Striking out Similiter — Reg. Gen. H. T., 2 Will. 4, r. 59.

Declaration contained two counts. The issues on the first count were complete; the second resulted in two surrejoinders, concluding to the country. The plaintiff added similiter, and delivered issue, with notice of trial for the 7th August. On the 6th, the defendants returned the issue and notice of trial, having demurred to one surrejoinder, and delivered a rebutter to the other. On the 7th, the plaintiff redelivered the issue, stating that he should rely on the notice of trial and the issues in fact. The plaintiff then entered a *remititur* as to the proceedings demurred to, tried the cause, and (the defendants not appearing) obtained a verdict:—

Held, that the issue was incomplete on the 7th; that the notice of trial for that day was, therefore, void, and it could not be rendered valid by any subsequent proceedings.

THIS was a rule calling upon the plaintiff to show cause why the issue, notice of trial, and subsequent proceedings in this action should not be set aside, on the ground of irregularity. The declaration, which was in trespass, contained two counts. The issues on the first count were complete, and the pleadings to the second count resulted in two rejoinders. The plaintiff on the 2d August delivered the issue containing surrejoinders, with similiter added, and gave notice of trial for the Surrey Assizes, the defendants being under terms of taking short notice. On the 6th August the issue and notice of trial were returned, the similiter to each of the surrejoinders being struck out, and a demurrer delivered to one surrejoinder, with a rebutter to the other; the rebutter was in the terms of the *similiter* which had been struck out. A summons was then taken out by the plaintiff, calling on the defendants to show cause why the demurrer should not be set aside as frivolous, or why the issue should not be amended, and why the notice of trial should not stand. This was heard on the 7th, before Patteson, J., who refused to make an order thereon. On the same day (the 7th August) the plaintiff redelivered the issue and notice of trial, with a notice that the plaintiff refused to take back the issue already delivered, giving the defendants further notice that he would rely upon the notice of trial already delivered, and the issues which were not the subject of demurrer. A demand was then made by the defendants of a joinder in demurrer. This was on the commission-day for the Surrey Assizes. On the 9th August a sum-

¹ 15 Jur. 1197.

Poole v. Pain.

mons was heard at the assizes, before Alderson, B., on which the defendants claimed to have the notice of trial set aside, upon the ground that no complete issue had been joined between the parties, and to set aside the issue and all subsequent proceedings, on the ground, that though after the delivery of the issue and notice of trial the defendants struck out the similisers added by the plaintiff, and delivered a demurrer and a rebutter, the said demurrer and rebutter were not set forth in the issue delivered. The learned judge made an order to the following effect:—"I do make no order as to the notice of trial; and as to the rest of the summons, on the plaintiff entering a remittitur as to the proceedings demurred to, I do make no order; but in the event of his not doing so, I do order that the issue be set aside as irregular." A remittitur was entered, the plaintiff proceeded to trial, and, the defendants not appearing, a verdict passed against them for 160*l*.

Shee, Serjt., (*Horn* and *H. T. Coles* with him,) now showed cause. The application to set aside the proceedings in this case was made upon the authority of *Twycross v. King*, 6 Q. B. 663; but that case was distinguishable, for there a replication was delivered to several pleas, concluding to the country as to each plea, but traversing one, with a special inducement. It was quite competent to the plaintiff to get rid of the issue of law raised by the demurrer, to treat the record as complete, and to go to trial on the issue of fact. *Bertram v. Gordon*, 2 Marsh. 144. In the case now before the court, that part of the count of the declaration which ended in the surrejoinder, to which a demurrer was delivered, had been got rid of by the remittitur, and the record was in every respect complete. There was no reason at all why the plaintiff should not try the issue in fact. By Reg. Gen., H. T., 2 Will 4, r. 59, "in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer." The effect of this rule was, that whenever, instead of an issue of fact, an issue of law arose, or the pleadings were concluded by default, and a writ of inquiry became necessary, and the plaintiff forthwith gave notice of executing a writ of inquiry, such notice would operate from the time that notice of trial was given. The

remittitur being entered to the demurrer, there was no necessity for a notice of a writ of inquiry. That being got rid of, the notice of trial, originally given when the plaintiff supposed all the issues would be issues of fact, remained good, notwithstanding one of the issues of fact was converted into an issue of law. The defendants could not be permitted to delay the trial by striking out a similiter, and doing nothing; it was a mere contrivance for delay. The order made by Alderson, B., the day before the trial, was, in its terms, sufficient to justify the plaintiff in the course he had taken.

[ERLE, J. If the remittitur had not been entered, would the notice of trial have been good; and if not, could a notice of trial for the 7th be made good by any thing that occurred on the 9th?]

A remittitur entered at any time before the trial makes the notice of trial good by relation. If the record were wrong, it was the defendants who had made it so by striking out the similiter to the surrejoinder. The notice of trial operated clearly on the 2d August, and the fact of the defendants having wrongfully struck out the similiter could not alter it. [They also cited *Milliken v. Fox*, 1 B. & P. 157; 1 Wms. Saund. 207.]

Lush, contra. The effect of the plaintiff adding the similiter was only to make the notice of trial good, if the defendants did not exercise their right of striking them out; the defendants had the option of accepting or rejecting them, and on the 6th, when they adopted the latter alternative, the plaintiff was put in the same position as if he had not delivered the similiter at all.

[ERLE, J. If there had been but one surrejoinder concluding to the country, with the similiter added by the plaintiff, the defendants could not strike out that similiter, and deliver another in precisely similar terms, for the purpose of defeating the notice of trial. Suppose the second had been the only surrejoinder, the plaintiff added the similiter; the defendants struck it out, and returned the issue on the 6th, with a demurrer. The plaintiff might on that day return that issue, with a joinder in demurrer, and notice of inquiry of damages; in that case the notice of inquiry of damages would operate from the date of the notice of trial.]

The rule operated only in two cases: first, where issue in fact is joined, so as to justify notice of trial; and, secondly, where issue in fact is not joined, and judgment goes by default. Except for that rule, in no event could a plaintiff give notice of trial till issue was joined. This case was not brought within the terms of that rule, and no advantage could be taken of it—it was not within either branch of the rule. *Adkins v. Anderson*, 10 M. & W. 12. That case is precisely in point. No issue was joined in any sense till after the day for which notice of trial had been given. Supposing the entry of a remittitur to be the same as a joinder in demurrer, yet this was not done till two days after the day for which notice of trial had been given; on that day the record was incomplete, and this placed the plaintiff in precisely the same position as if he had merely replied. Although issue was completely joined on one count, it was not upon

Doe d. Lansdell v. Gower.

the other. When issue is joined in law as well as in fact, then, and then only, can a plaintiff go to trial. Before coming to the court for judgment as in case of a nonsuit, it must always be shown that issue is completely joined.

ERLE, J. You have satisfied me that on the 6th August the defendants had a right to demur, and that demurrer, not being set aside as frivolous, prevented the notice of trial from operating; the issue was incomplete on the 7th August. On the 7th, therefore, the notice of trial was void, and nothing the plaintiff could do after the day for which the notice was given could render it valid. It appears to me that the issue and trial were irregular, and must be set aside.

Rule absolute; the costs to be costs in the cause.

DOE d. STEPHEN LANSDOLL and Others, Churchwardens and Overseers of the Poor of the Parish of Pembury, v. GOWER.¹

November 15, 1851.

Notice to Quit after Disclaimer — Lease by Parish Officers — Stat. 59 Geo. 3, c. 12, s. 17 — "Lease in Writing" — Stat. 3 & 4 Will. 4, c. 27, ss. 5, 8.

In 1824, J. B., a pauper of the parish of P., was put into a parish house, under the following memorandum in the parish book, signed by one of the overseers:—"We, the churchwardens and overseers of the poor of the parish of P., do hereby agree to let to J. B. of the parish of P., the cottage, situate, &c., at the rent of 1s. 6d. per week; and the said J. B. doth hereby agree to quit and give up the said cottage to the parish officers at any time on one month's notice." J. B. continued in possession, without payment of rent, until 1844, when the parish officers gave him a notice to quit, signed by three only of them, which he refused to do. In 1850, J. B. conveyed the cottage to defendant. In ejectment by the parish officers:—

Held, first, that there having been a disclaimer by J. B., no notice to quit was necessary;

Secondly, that the memorandum, not being signed by all the parish officers or by their order, was not a lease, in pursuance of sect. 17 of stat. 59 Geo. 4, c. 12; and, therefore,

Thirdly, that the action, not being within sect. 5 of stat. 3 & 4 Will. 4, c. 27, was barred by section 8.

EJECTMENT by the churchwardens and overseers of the poor of the parish of Pembury, in the county of Kent, to recover a house and garden. The demise was laid on the 7th May, 1851. On the trial, before Jervis, C. J., at the Spring Assizes at Maidstone, it appeared that, in 1824, Joseph Boghurst, a pauper of the parish of Pembury, was allowed by the parish officers to take possession of a piece of waste ground, upon which they built a cottage for him, and he signed the following entry in the parish book:—

"Memorandum. — Vestry Room, February 27, 1824.

We, the churchwardens and overseers of the poor of the parish of Pembury, in the county of Kent, do hereby agree to let to Joseph

Doe d. Lansdell v. Gower.

Boghurst, of the said parish, the newly erected cottage and premises, situate at Henard's Green, in the said parish, at the rent of 1s. 6d. per week; and the said Joseph Boghurst doth hereby agree to quit and give up the said cottage, &c., into the hands of the parish officers of the said parish, at any time, on one month's notice being given to that effect by the churchwardens and overseers for the time being, or one of them by their order; and the said Joseph Boghurst doth hereby further agree not to take in any other person as inmate or lodger, nor suffer any other persons whatsoever to occupy or reside on the said premises but himself, his wife and children, without the leave of the parish officers specially granted for that purpose; the rent, as above, shall commence from the date hereof. Witness our hands this 27th day of February, 1824.

BENJAMIN PAWLEY, Overseer.

GEORGE BUDGEN, Assistant Overseer.

WILLIAM PAWLEY, Witness.

(Signed) JOSEPH BOGHURST."

At that time there were two churchwardens and two overseers in the parish. Boghurst continued in possession, without payment of rent or acknowledgment of title, until 1844, when the parish officers gave him a notice to quit, signed by three only of them, and upon his refusal to quit they took proceedings against him before the magistrates, which were dismissed. In 1850 he conveyed the premises to the defendant. It was objected for the defendant, first, that the memorandum in the vestry book was not signed by either of the churchwardens, and therefore was not a letting under statute 59 Geo. 3, c. 12, s. 17, which required that there should be an execution of the instrument by all the parish officers; and therefore, there being a tenancy at will only, or from month to month, the action was barred by section 7 of statute 3 & 4 Will. 4, c. 27. Secondly, that the notice to quit, not being signed by all the parish officers, was not sufficient. A verdict was entered for the lessors of the plaintiff by the direction of the Chief Justice, leave being reserved¹ to the defendant to move to enter a nonsuit. In this term, November 4,

Shee, Serjt., moved accordingly. First, there was no lease in writing within section 8 of statute 3 & 4 Will. 4, c. 27, because it was not signed by all the parish officers, within section 17 of statute 59 Geo. 3, c. 12, who are by that statute constituted a *quasi* corporation. *Phillips v. Pearce*, 5 B. & Cr. 433; *Ward v. Clarke*, 12 M. & W. 747; 8 Jur. 364; *Doe d. Higgs v. Terry*, 4 Ad. & El. 274. Secondly, the notice to quit is not sufficient.

LORD CAMPBELL, C. J. There was a disclaimer by Boghurst, under whom the defendant claims, and therefore no notice to quit was necessary.

PATTESON and WIGHTMAN, JJ.¹, concurred.

¹ COLERIDGE, J., was absent on account of the illness of a relative.

Doe d. Lansdell v. Gower.

The Court granted a rule *nisi* on the first point.

Bramwell and *Willes* now showed cause. First, by the 5th section of statute 3 & 4 Will. 4, c. 27, the right of the reversioner to make an entry or bring an action does not accrue until the estate or interest in possession is determined by notice to quit or disclaimer, and, therefore, if that section applies, the action would be in time. Section 7 applies only to tenancies at will. Section 8 applies to tenancies from year to year or other period "without any lease in writing." In this case there is a lease in writing, and therefore it falls within section 5. The memorandum of the 27th February states the terms of the holding, and shows an interest in land from week to week, determinable on a month's notice. 4 Bac. Ab. "Leases and Terms for Years," L. 3; *Kemp v. Derrett*, 3 Camp. 510. As to the objection arising upon statute 59 Geo. 3, c. 12, the 17th section does not say that the parish officers are to demise by writing signed by all of them. In *Smith v. Adkins*, 8 M. & W. 362, Parke, B., said, (p. 370,) "A second objection was, that the churchwardens and overseers did not accept the demise by some instrument under a common seal. We think that the answer to this objection is, that they are not made, by the act 59 Geo. 3, c. 12, s. 17, a complete body corporate, but they are only empowered 'to accept, take, and hold in the nature of a body corporate.' In *Gouldsworth v. Knights*, 11 M. & W. 337, it was held that it was competent for any one of the parish officers to make a warrant of distress for rent in arrear. This lease, being not under seal, might be made by an agent duly authorized on behalf of the parish officers, and therefore it is not necessary that it should be signed by all.

[PATTESON, J. This instrument does not, on the face of it, profess to be executed by one on behalf of the others.]

It purports to be a demise by all; and sect. 5 of stat. 3 & 4 Will. 4, c. 27, does not require that the writing should be signed by the landlord. It is only necessary that the party, whose rights are to be affected by the writing, should sign it. Further: it is not necessary that the one who signed should state he signed for all—it is enough if it is shown that he signed for all; and here there was evidence that the others concurred. At any rate, that objection was not taken at the trial; and if it had been, and the question had been left to the jury, they would have found that it purported to have been a demise by all. In *Cooch v. Goodman*, 2 Q. B. 580, it was held that the want of execution of the deeds by the plaintiffs was not such a failure of consideration as to be an answer to the action.

[WIGHTMAN, J. Though it might be binding on the lessee as a contract, would it be a lease in writing?]

Suppose a tenant executes a counterpart of a lease, and the landlord on ejectment produced the counterpart, would it be an answer that he did not produce the part executed by himself, which might be lost?

[WIGHTMAN, J. In that case it would be taken that there was a lease; here the whole instrument is produced. Suppose it sufficiently appeared that the lease was not executed by the lessor?]

Doe d. v. Gower.

Shee, Serjt., (*Horn*, was with him,) *contra*. The lessors of the plaintiff must contend that there was a lease in writing by the churchwardens and overseers of the parish of Pembury for the time being, within the meaning of sect. 5 of stat. 3 & 4 Will. 4, c. 27.

[WIGHTMAN, J. Suppose there was evidence that the other parish officers assented to the memorandum, though they did not sign it?]

That would not satisfy sect. 17 of stat. 59 Geo. 3, c. 12, which makes the churchwardens and overseers a *quasi* corporation, though it does not require them to act under seal. Sect. 24, which empowers two justices to deliver the possession of parish houses after notice by the churchwardens and overseers, expressly allows the notice to be signed by the churchwardens and overseers, or the major part of them.

[WIGHTMAN, J. Suppose the persons leasing had not been parish officers, and they had professed to demise by an instrument purporting to be executed by all, but not signed by all?]

That would not be enough. *Pitman v. Woodbury*, 3 Exch. 4, in which *Cooch v. Goodman*, 2 Q. B. 580, was doubted.

He also cited *Richardson v. Gifford*, 1 Ad. & El. 52; Lord Tenterden in *Rose v. Poulton*, 2 B. & Ad. 822, 828; and Parke, B., in *Eagleton v. Gutteridge*, 11 M. & W. 465, 467.

Further: there was no lease in writing, because no determinate time for the continuance of the tenancy was fixed by the instrument. 4 Bac. Ab. "Leases and Terms for Years," K.

[WIGHTMAN, J. By implication the memorandum gives to the lessees an interest for a week or a month.]

He was then stopped.

PATTESON, J.¹ We need not trouble you further. The whole question is, whether the document signed by one of the overseers of Pembury is a lease in writing, so as to bring the case within section 5, construed with reference to section 8, of stat. 3 & 4 Will. 4, c. 27. It is said that, under stat. 59 Geo. 3, c. 12, it is not necessary that it should be in writing; and that is true, and therefore, notwithstanding some defect in the instrument, some tenancy, as a tenancy from year to year, might be created. But if there is no actual lease in writing within sect. 8, of stat. 3 & 4 Will. 4, c. 27, the twenty years from the time when the right of entry accrued would have passed, and the defendant would have been entitled to hold the premises against the lessor of the plaintiff. The latter part of Serjeant Shee's argument did not rest upon a strong point, because it is easy to raise an implication from this instrument, that there was a tenancy for a month. *Kemp v. Derrett*, 3 Camp. 510. But the question is, whether it is sufficient if executed by one only of the parish officers. I take the words "lease in writing," in sec. 8, of stat. 3 & 4 Will. 4, c. 27, to mean, not merely a document in writing, but a lease; that is, an instrument passing an interest. The argument from sec. 9, is, I think, too far-fetched, and the words of that section do not throw any light upon the point. If an instrument professes to be made by one only, of several persons, and it is executed by one only, it cannot be taken to be a lease, because it does not pass an interest. But it is said,

¹ Lord Campbell, C. J., was in the Court of Criminal Appeal.

Regina v. Brown.

that in the case of an instrument not under seal, it is good if it is executed by one and assented to by the others. If it professes to have the assent of the others, and that the party executing it had authority from the others, it might lie on the other side to show that he had no authority. It is said further, that though the instrument does not purport to be so made, if the others assented to it, it would be a good lease. I doubt that proposition; but if it be maintainable, it lies upon those who assert it to prove an assent by the others. There is no evidence of it in this case, and the instrument on the face of it does not show that the overseer who signed it had the authority of the other parish officers.

COLERIDGE, J. It is clear that the lessors of the plaintiff are barred by sec. 8, of stat. 3 & 4 Will. 4, c. 27, unless they can show that there has been a lease in writing. The question, therefore, is, what is a lease in writing within the meaning of the 8th section? And I am of opinion that it is not merely an instrument which might be evidence of a tenancy, but it must be a lease passing an interest from the party giving to the party taking. This document is signed by one of the parish officers only, and he does not profess to have signed for the rest. I am of opinion that is not enough within sec. 17, of stat. 59 Geo. 3, c. 12, which creates the churchwardens and overseers a statutory corporation, though not with all the powers of a corporation. Suppose there was additional evidence that the parish officer who signed the memorandum had taken the opinion of the other parish officers, and they had instructed him to sign for them: it is not necessary to give an opinion whether that would be enough, because, this document on the face of it not showing any authority of the one officer to act for the others, it lay upon the other side to show that he was the agent of the others for the purpose of executing it.

WIGHTMAN, J. After much discussion, the case resolves itself into the point, whether there is a lease in writing within sect. 8 of stat. 3 and 4 Will. 4, c. 27. It may be a document binding upon the person who signed it as tenant, but that is not enough. In order to fulfil the description of "a lease in writing" it must be an instrument which passes an interest. This is not such an instrument, and therefore I concur in making the rule absolute. *Rule absolute.*

REGINA v. JOHN BROWN.¹

January 15 and 22, 1852.

Vagrant Act, 5 Geo. 4, c. 83, s. 4 — Apprehension of suspected Persons frequenting Streets and Highways.

By sect. 4 of stat. 5 Geo. 4, c. 83, every reputed thief frequenting any river, canal, &c., or any quay, wharf, or warehouse adjoining thereto, or any street, highway, or avenue lead-

Regina v. Brown.

ing thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond:—

Held, First, that the section applied to all streets and highways, (PATTESON, J., dissenting.)

Secondly, that a conviction which stated an intent to commit felony generally was good.

THE defendant had been convicted, before a justice of the peace for the county of Kent, for that he, "being a reputed thief, did frequent the public highway in the said parish of Ashford, with intent to commit felony, contrary to the form of the statute in that case made and provided," and was adjudged to be committed for the said offence to a house of correction in the said county, to be kept to hard labor for three calendar months. He was brought up by *habeas corpus* before Erle, J., at chambers, when it was contended that sect. 4 of the Vagrant Act, 5 Geo. 4, c. 83, referred only to a highway leading to a river, canal, or navigable stream, or adjacent to a place of public resort; and the opinion of Patteson, J., to that effect, in a case before him at chambers, on November 30, 1850, was cited from *The Justice of the Peace*, January 25, 1851.¹ Thereupon Erle, J., said that he would refer the question to the court, and made an order for discharging the defendant on recognizances, to appear in the Court of Queen's Bench on the first day of next Hillary Term, and then apply to the court to quash the commitment, and if the court should refuse to quash the commitment, to surrender himself to the custody of the keeper of the said house of correction, there to undergo the sentence under the said commitment.

On January 15,² *Huddleston* moved accordingly, when

Rose, for the prosecution, objected that the defendant was not present in court.

LORD CAMPBELL, C. J. It is clear the defendant ought to be present.³

Rose prayed that, the keeper of the house of correction being now present, the postponement of the case should be upon payment of his costs of attending on the next day. The court may order the recognizances to be estreated, and the estreat might be taken off upon payment by the defendant of those costs.

¹ The opinion referred to was as follows: "I am of opinion that the words 'leading thereto' must be coupled with 'street and highway,' as well as with 'avenue,' and that the offence is confined to streets and highways leading to a river, &c. In the repealed act, 3 Geo. 4, c. 40, no doubt can be raised, for 'leading thereto' is coupled directly and unequivocally with 'streets and highways.' The same construction must prevail as to the 5 Geo. 4, for the legislature never could have intended, by the alteration of a word or two, rendering the sense only somewhat doubtful, to introduce an entirely new and different offence."

² Before LORD CAMPBELL, C. J., PATTESON and WIGHTMAN, JJ.

³ See *Regina v. Cudwell*, 15 Jur. 1011; s. c. 6 Eng. Rep. 352.

Regina v. Brown.

LORD CAMPBELL, C. J. We cannot do more at present than postpone the case.

January 22. *Huddleston* moved that the commitment should be quashed. First, the conviction ought to have stated that the highway was one leading to a river, canal, or navigable stream, or adjacent to a place of public resort.¹ Where all streets and highways are intended by the statute, they are mentioned generally, as in the clause of the same section against exposing the person "in any street, road, or public highway, or in the view thereof." The legislature may have considered that the valuable property placed on quays, wharves, and in warehouses near canals and navigable rivers required special protection. If sect. 4 applies to all highways, a person who had been convicted of stealing, and on his discharge, at the expiration of his term of imprisonment, was passing along a highway, might be taken up as a reputed thief.

[LORD CAMPBELL, C. J. He must be on the highway with intent to commit felony; and what you suggest might occur if the avenue from the prison led to a canal or navigable river.

COLERIDGE, J. If the highway first mentioned is limited to one leading to a place of public resort, that is provided for in the word "avenue." It would be very proper that a man standing in an entry close to a highway should be within the enactment.]

A highway adjacent to a place of public resort is *along* it—an avenue *leads to it*. In sect. 3 of stat. 3 Geo. 4, c. 40, which would have expired on the 1st September, 1824, the highway must have been one leading to a canal or navigable river.

[LORD CAMPBELL, C. J. The two statutes are not in *pari materia*. If any defect existed in stat. 3 Geo. 4, c. 40, it may be supposed that stat. 5 Geo. 4, c. 83, would correct it.]

In that case the clear language employed in the earlier part of the 4th section would probably have been used. Stat. 5 Geo. 4, c. 83, which received the royal assent on the 21st June, 1824, was not passed for amending the former act.

[COLERIDGE, J. Are any new cases introduced in sect. 4 of stat. 5 Geo. 4, c. 83, which were not in sect. 3 of stat. 3 Geo. 4, c. 40? The preamble of stat. 5 Geo. 4, c. 83, after mentioning stat. 3 Geo. 4, c. 40, proceeds—"And whereas the said act was to continue in force until the 1st September, 1824, and no longer; and it is expedient to make further provision for the suppression of vagrancy," &c.]

The only difference is in the collocation of the acts rendered

¹ By sect. 4 of stat. 5 Geo. 4, c. 83, it is enacted, among other things, "that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender to the house of correction, there to be kept to hard labor for any time not exceeding three calendar months."

Regina v. Brown.

punishable. Secondly, the conviction does not state that the defendant had the intent of committing a felony in the highway in which he was. *Fletcher v. Calthrop*, 6 Q. B. 880; 9 Jur. 205.

[LORD CAMPBELL, C. J. Then you must contend that if the defendant had an intention to commit a felony in the next street, a police constable would not have authority to apprehend him.

WIGHTMAN, J. In *Fletcher v. Calthrop* there might be an intent to kill game in a lawful place: it is unlawful to commit a felony anywhere.]

Rose, (with him was *G. Denman*.) contra. Sect. 4 of stat. 5 Geo. 4, c. 83, was not intended to protect particular property: the legislature intended to make further provision for the suppression of vagrancy than had been made in sect. 3 of stat. 3 Geo. 4, c. 40. [He was then stopped.]

LORD CAMPBELL, C. J. With the most sincere and profound reverence and respect for my Brother Patteson, I am bound to say that when I look to sect. 4 of stat. 5 Geo. 4, c. 83, I am of opinion that the conviction is sufficient. I think there are words in sect. 4 of stat. 5 Geo. 4, c. 83, which fairly bring it within the scope of the enactment. I cannot place any reliance on the 3d section of stat. 3 Geo. 4, c. 40, because, where the language of the latter statute varies from that of the earlier, it must be supposed that the variation was intentional, and that the object of the legislature was, to make the latter enactment more perspicuous and extensive. The words of sect. 4 of stat. 5 Geo. 4, c. 83, are, "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto,"—a highway is not yet mentioned,— "or any street, highway, or avenue leading thereto"—I should say an avenue leading to a street or highway was meant. Then follow the words, "or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent." Adjacent to what? To the street or highway. Therefore I think the words in the conviction are supported. It is imputing a great absurdity to the legislature to say that a highway is not to be protected because it does not lead to any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto. I am of opinion that all highways are protected, and that any person, being a reputed thief, found there with intent to commit a felony, is liable to be convicted under this section.

Another objection is, that the word "there" is not found in the conviction. Now, *Fletcher v. Calthrop*, 6 Q. B. 880; 9 Jur. 205, was decided upon a different act of parliament, passed for a totally different purpose; unless the intention of the party was to take game in the place where he was, the offence which the legislature intended was not committed. Under this statute, the intent to commit a felony anywhere subjects a reputed thief to this discipline.

PATTESON, J. As to the objection that the word "there" is not in

the conviction, *Fletcher v. Calthrop*, 6 Q. B. 880; 9 Jur. 205, does not govern this case, because the decision in that case is to be taken with reference to the particular act upon which the conviction was founded, 6 Geo. 4, c. 69, s. 1, which is a peculiar act. It was said that it was absurd to suppose that if a man was in the close of another person, intending to pass over it in order to arrive at preserves of his own, and there kill his own game, he was liable to be convicted of an offence against that statute.

As to the other point, I considered it very much in a case before me at chambers, and came to the conclusion that the legislature intended to limit the offence to streets and highways either leading to a canal or navigable river, or adjacent to a place of public resort; and I confess, I find that it is a difficult thing to shake one's opinion, formed after consideration. I think that the words "leading thereto" must be coupled with "street and highway," as well as with "avenue." If the enactment had been intended to be general, the words "any street, highway, or place adjacent" might easily have been placed at the beginning of the section, and then there would have been no doubt. If all highways were included in the first mention of them, it was unnecessary and idle to add the words "or any avenue leading thereto"—that is, to a place of public resort: I cannot understand why the words "street, highway," should be introduced twice over; though in the second mention of them it is not said to what the street and highway are to be adjacent. An avenue leading to a highway would not include a highway leading to a wharf. I cannot bring my mind to any other conclusion, though I am glad that the rest of the court see their way to a different construction of the enactment, because I do not doubt that, when so extended, it is a useful enactment.

COLERIDGE, J. I will add nothing on the second point, upon which we all agree.

As to the first point, I agree with Lord Campbell, though I cannot express my opinion with confidence, because it differs from that of my Brother Patteson. There is no doubt that this case is within the scope of stat. 5 Geo. 4, c. 83, and that that statute is a very beneficial one. I agree, however, that that is not enough, and that the statute must not be strained in order to bring the case within it. But I find words large enough to embrace it. If the words "any street, highway, or place," stood alone, there could be no question. Is any difficulty raised by the use of the word "adjacent" after those words? It makes perfectly good sense if the word "adjacent" is referred, according to the grammatical rule applicable to words of reference, to the next antecedent, which is "highway." There is abundant reason for saying that all highways, as well as those leading to a canal, navigable river, or wharf, are within the object of the act. The difficulty is, that the words "street, highway, or avenue leading thereto," occur in an earlier part of the same sentence; and it is possible that those words may be tied up to what precedes, viz. canals, navigable rivers, and so on. But why should the words at the end

Hope v. Beadon.

be so tied up? The argument is, that it was unnecessary to insert the words "any street, highway," in the earlier part of the section, because the general words at the end would include them; but in an enactment which absurdly and mischievously accumulates words, those words may be taken to be unnecessarily repeated.

WIGHTMAN, J. I should not be disposed to entertain any doubt, but for the opinion of my brother Patteson. There is no reason for thinking that the legislature did not consider that a person standing on a highway generally, as well as on a highway leading to a canal or navigable river, was within the enactment in sect. 4 of stat. 5 Geo. 4, c. 83. The section mentions "any street, highway, or avenue leading thereto"—that is, to the quay, wharf, or warehouse; and proceeds, "or any place of public resort, or any avenue leading thereto"—that is, to a place of public resort. Then comes the clause, in which are general words, without the words "leading thereto." Those words are necessary in order to limit the street or highway, as contended for on behalf of the defendant.

The last objection has been sufficiently answered by the rest of the court.

Prisoner remanded.

HOPE v. BEADON.¹

November 7, 1851.

Notice to produce — Second Trial.

A notice to produce documents, given in the ordinary form for the purpose of a former trial, and served before the first trial upon a party to the action, or his agent, may be used, as against such party, without re-service, on a new trial of the same cause.

The legal effect of such a notice is, that it gives the party to the action, upon whom, or upon whose agent, it has been served, the option either to produce the documents named in it which were in his possession when it was served, or to admit the accuracy of any satisfactory evidence of the contents of those documents which may be produced on behalf of his adversary at the trial.

In this case, which was tried at the Bristol Summer Assizes, 1851, *coram* Lord Campbell, C. J., the plaintiff was desirous to support his case by evidence contained in certain documents asserted to be in the custody of the defendant; but it was objected by the counsel for the defendant, that his client had not received any sufficient notice to produce. Thereupon the plaintiff proved, that, in consequence of some miscarriage at a former trial, the trial then pending was the second in the same cause, and that the previous trial was had in 1850, and that a notice to produce the document in question was, before that trial, served upon the defendant, and that such notice, which was

¹ 16 Jur. 80; 21 Law J. Rep. (N. S.) Q. B. 25,

Hope v. Beadon.

now at the second trial produced, was in the following terms:—
“Take notice, that you are hereby required to produce and show to the court and jury, *on the trial of this cause, &c.*, the documents in question.” Upon this evidence the defendant's counsel renewed his objection; but the learned judge, after some discussion, admitted secondary evidence of the documents in question.

November 7, 1851. *Kinglake*, Serjt., now moved for a new trial,¹ on the ground of improper reception of evidence. The cases cited at the trial were the cases of *Ellon v. Larkins*, 5 Car. & P. 385; and *Doe d. Wetherell v. Bird*, 7 Car. & P. 6, in which, at a second trial, admissions made by the respective attorneys for the purposes of the first trials, beginning, “We hereby agree to admit, on the trial of this cause,” &c., were received by Tindal, C. J., and Lord Denman, C. J., respectively at the second trials, though no new summons or other step had been taken between the parties between the first and second trials in those cases. But the answer to those cases is, that there is a manifest distinction between an admission and a notice to produce. In the first place, the admission is the act of the person against whom it is to be put in evidence, which he might be unwilling to repeat, but which he could hardly have made once if the fact admitted were untrue; but the notice to produce is the act of the person insisting upon it, who may repeat it, and cannot be prevented from repeating it, as often as he thinks fit: and, secondly, there would be the greatest inconvenience in holding a notice to produce binding forever, because the effect would or might be to impound documents for years; whereas the necessity of re-serving a notice to produce leads to no inconvenience whatever.

PATTESON, J. The reason given by Tindal, C. J., for the binding force at the second trial of the admission made for the purpose of the first trial is, that the former trial is deemed as no trial. That reason is equally applicable to the alleged binding force of a notice to produce.

ERLE, J. As to the argument of inconvenience, the effect of holding the notice binding at the second trial would not be, as has been suggested, to impound any document, because it is not the effect of a notice to produce that it obliges the party to the action upon whom it is served to produce the document named in the notice, but it only gives him the option either to produce it, or to be bound by satisfactory secondary evidence of its contents.

PATTESON, J. No express authority has been cited in favor of the objection taken to the reception in question, but reliance was placed upon the alleged general practice of re-serving, for the purpose of a new trial, the notices to produce served for the purposes of the former trial. The Masters, however, informed us that such is not the prac-

¹ *Coram* LORD CAMPBELL, C. J. PATTESON and ERLE, JJ.

Hope v. Beadon.

tice, and that in their office the costs of such a re-service are always refused. But, however the practice may have been, it seems to me that legal reasoning is against the necessity of re-serving the notice to produce. The form of the notice is general, to produce at the trial of the cause. When the first trial is held to have miscarried, it is deemed, in law, to have been as no trial; then the second is the trial in contemplation of law; and the notice is, in form, to produce at the trial. It seems to me, therefore, that such notice is binding on the party to the action, upon whom, or upon whose agent, it may have been served, either to produce the documents mentioned in it at the second as well as at the first trial, or to be attainted as much at the second as at the first trial, by satisfactory secondary evidence of the documents' contents.

ERLE, J. I think that to impose a necessity of re-serving the notice, would be to impose the necessity of a useless expense. I cannot see any inconvenience in holding that there is no necessity to re-serve such a notice. There might have been inconvenience if the effect of the notice had been, as suggested, to impound the documents named in it; but there is no inconvenience, because there is no such effect. The only effect of the serving a notice to produce upon a party to an action, or upon his agent, is, that such party is thereby obliged either to produce at the trial the documents mentioned in the notice, or to be bound by any satisfactory secondary evidence which may be offered by his opponent of the contents of those documents. I am happy that the course of practice has been found to be in accordance with this ruling; and that it has been so appears from this: that the Masters inform us that in case of a new trial granted and had, the costs of any re-service of notices to produce are never allowed by them.

LORD CAMPBELL, C. J. I entertain the same opinion as that upon which I acted at the trial, namely, that as the notice to produce is, in terms, a general notice to produce at the trial of the cause, it must be held in law to be a notice to the party, upon whom it has been duly served, to produce at the trial of the cause, whenever that may be; and it seems to me that the argument of the inconvenience of such a decision has been properly answered by the statement of the legal effect of such a notice. I agree that the effect of the service of such a notice upon a party to an action, or on his agent, is, not to compel such party to produce the documents named in the notice, but that the effect is to oblige him either to produce the documents, or to admit the accuracy of any satisfactory secondary evidence of the contents of those documents which his adversary may produce. I confess that I had thought, that the ordinary practice of lawyers was, to re-serve all notices to produce in case of a new trial granted. But the Masters of the court tell us that they have been accustomed to disallow the costs; and I think they were right.

Rule refused.

Montagu v. Smith.

MONTAGU v. SMITH.¹

November 25, 1851.

Special Jury—5 Geo. 4, c. 50, s. 30—Mistrial by Common Jury.

Defendant obtained a rule for a special jury, which was nominated and reduced, but no jury process issued. Afterwards plaintiff obtained a judge's order, by which the cause was to be tried as a common jury cause, and come on in its turn in the common jury list, but defendant was to be at liberty to try it before a special jury if he could procure their attendance on that day. The cause was tried by a common jury as undefended:—

Held, that the trial was irregular.

THIS was an action against an attorney by a law stationer for writing done by him for the defendant. The venue had been originally laid in Surrey, and had been changed by a common order to Middlesex, when notice of trial was given for the second sittings in Michaelmas Term. On the 27th October the defendant obtained a rule for a special jury: on the 30th October there was an appointment to nominate the special jury, which was attended by both parties, and the nomination was made: on the 31st both parties attended, and agreed to the list as reduced, but no jury process was issued: on the 1st November the plaintiff obtained a judge's order that the cause should be tried as a common jury cause, and should come on in its turn at the second sittings in Michaelmas Term, but that the defendant should be at liberty to try it before a special jury if he could procure their attendance on that day. The defendant having taken no steps to summon the special jury, the cause was called on in its turn on the common jury list, and, the defendant not appearing, was tried as an undefended cause, and a verdict given for the plaintiff. On a subsequent day,

Pashley moved for a rule calling upon the plaintiff to show cause why the trial should not be set aside for irregularity, with costs. He cited *Haldane v. Beauclerk*, 3 Exch. 658; 13 Jur. 326.

[LORD CAMPBELL, C. J. In *Rex v. Perry*, 5 T. R. 523, the court held, that after a special jury had been struck, the cause must be tried by that jury.] *Rule nisi*.

Lush now showed cause. The words of sect. 30 of stat. 6 Geo. 4, c. 50, which gives the courts power to order a special jury to be struck, are, "every jury so struck shall be the jury returned for the trial of such issue," not "shall be the jury to try the cause:" they are directory to the sheriff. Sect. 34 imposes upon a party who applies for a special jury the burthen of paying all the fees and expenses occasioned by the trial of the cause by the same. It is the duty of the party who has obtained the order for the trial of the cause by a special jury to take the proper steps for having the jury summoned. A

¹ 16 Jur. 40.

Montagu v. Smith.

party may waive or abandon the order for a special jury, and if he does so, he cannot be heard to say that there was an irregularity in trying it before a common jury; and if he takes no steps for having the jury summoned, he must be assumed to have abandoned the order. In *Rex v. Lambert and Perry*, 5 T. R. 453, there was no evidence of an intention to abandon the rule for a special jury. In *Holt v. Meadowcroft*, 4 Mau. & S. 467, the jury did not attend, and the plaintiff had taken all the steps necessary to perfect his privilege. The Court of Exchequer, in *Haldane v. Beauchlerk*, 3 Exch. 658; 13 Jur. 326, did not advert to this distinction; and the rule of practice laid down in that case puts the parties to great expense.

[LORD CAMPBELL, C. J. The Chief Baron says, (3 Exch. 661; 13 Jur. 326,) "I come to the conclusion in some respects with regret, because it is undoubtedly a means by which a defendant, by moving for a special jury, and merely taking the trouble of getting the jury struck and reduced, may thereby impose upon the other party the expense of summoning the jury, — possibly" — he should have said "certainly" — "the expense of paying the jury."

COLERIDGE, J. *Haldane v. Beauchlerk*, 3 Exch. 658; 13 Jur. 326, has in some sense altered the practice: orders which used to be made before that case have not been made since.

LORD CAMPBELL, C. J. *Archer v. Bamford*, 1 Car. & P. 64, justifies my recollection as to the practice when a special jury in any case had not been summoned: there was no doubt whether it might be tried by a common jury — the only question was, as to the order in which it should be taken. In that case, Abbott, C. J., says, (p. 65,) "The proper way is, when in any case the special jury has not been summoned, for the case to be taken after the other special jury causes fixed for that day are disposed of;" and then it must be tried by a common jury. And this practice is corroborated by one of the Masters, Sir Archer D. Croft, who was associate to Lord Denman for many years.]

That is the more convenient practice. The direction in the 30th section must be understood as applying only if the defendant takes out a summons to the sheriff. That part of the act cannot come into operation until the writ has issued to the sheriff.

[LORD CAMPBELL, C. J. Suppose the defendant had written a letter to the plaintiff's attorney, stating, that, although the special jury had been struck, he abandoned it. If the defendant does not do what the act of parliament requires him to do, it may be inferred that he has abandoned the order for a special jury.]

Further, if there has been a mistrial, it is error in fact: it may be stated on the record that the special jury had been struck, and then advantage may be taken of it by writ of error.

Pashley, contra. According to the established practice, it is the duty of the plaintiff to summon the special jury, though the defendant obtained the order for the trial of the cause by a special jury; and if none of the special jurors attend, the cause cannot be tried, unless by consent. *Lush's Pr.* 478. Therefore the defendant has not

Montagu v. Smith.

been guilty of any default. If delay is the object of the defendant, he only gets the order for a special jury, and does not reduce it; if the special jury is reduced, there is no delay, because the plaintiff may take the steps for summoning it. In *Holt v. Meadowcroft*, 4 Mau. & S. 467, Lord Ellenborough, speaking of sect. 15 of stat. 3 Geo. 2, c. 25, in which were similar words to those in sect. 30 of stat. 6 Geo. 4, c. 50, said, (p. 469,) "The language of the statute does, I think, import a negative." In *Archer v. Bamford*, 1 Car. & P. 64, the cause was rightly tried as a common jury cause, if the special jury had not been reduced, according to the practice laid down by Lord Ellenborough in 1 Stark. N. P. C. 31.

[LORD CAMPBELL, C. J. The words of sect. 15 of stat. 5 Geo. 4, c. 60, are, "every jury so struck," not "every jury so reduced," shall be the jury returned for the trial of the cause: therefore, construing it literally, after the jury have been struck, the trial of the cause must go on.]

Reducing the special jury is the same thing as striking the special jury.

[LORD CAMPBELL, C. J. In former times the striking of the special jury was the act of the officer of the court—reducing it was the act of the parties.]

LORD CAMPBELL, C. J. I feel bound by the decision of the Court of Exchequer; but I confess that, without that decision, I should have decided this case the other way, because I think that the legislature never could have intended that the expense of summoning the special jury should be borne by the plaintiff, when the defendant had abandoned his right of having the action tried by a special jury, the order for a special jury being obtained in many instances for the purpose of delay only, and the defendant may be in insolvent circumstances. I should have thought that all the language of the statute was to be construed with reference to the implied condition, that the defendant, keeping his right alive, should take the necessary steps to secure the attendance of the jury; but if he gave notice to the plaintiff, or by his acts declared that he abandoned the privilege, I should have read the words of the 30th section, "every jury so struck shall be the jury returned for the trial of such issue," as subject to that condition. However, the Court of Exchequer have, upon grave consideration, put a different interpretation upon the words. I always feel great pain in differing from my learned brethren, and only differ from them when I feel imperatively compelled to do so; and in matters of practice especially, uniformity of decision is of great importance. I therefore feel myself bound by the decision of the Court of Exchequer. But I must express a hope that the legislature will ere long relieve the mode of procedure in our law from the great reproach to which it is subject by this decision.

PATTESON, J. I regret our decision, but cannot help it.

COLERIDGE and WIGHTMAN, JJ., concurred.

Rule absolute.

 Arnold v. Goodered.

ARNOLD & another v. GOODERED.¹

Bail Court, November 22, 1851.

Practice — Staying Proceedings — Payment of Debt and Costs.

A defendant, upon whom a writ of summons had been served, indorsed for 77*l.* 18*s.* 8*d.*, applied to a judge at chambers to stay proceedings upon payment of that sum. Between the issuing of the writ and the hearing of the application the plaintiffs had sold certain wine, which had been deposited with them as collateral security for the payment of the bills upon which the action was brought, and they refused to take the whole amount indorsed upon the writ, but offered to take that sum less the amount realized by the sale of the wine. This the defendant would not consent to, alleging that the sale was fraudulent, and that he would be prejudiced by allowing the amount said to have been produced by it. The judge at chambers refused to make any order:—

Held, upon application to the court to stay proceedings upon payment of 77*l.* 18*s.* 8*d.*, with interest and costs up to the time of the hearing at chambers, that the plaintiffs were not bound to accept from the defendant more than was actually due to them, although a larger sum than they now claimed had been indorsed upon the writ, and that the defendant could not be prejudiced in any cross claim which he might have by paying a less sum.

In this case a rule had been obtained calling upon the plaintiffs to show cause why all proceedings in this action should not be stayed on payment of 77*l.* 18*s.* 8*d.*, with interest and costs up to the time when an application to stay proceedings had been made at chambers. It appeared that the writ in the cause, indorsed for the sum of 77*l.* 18*s.* 8*d.*, was served upon the defendant in August last; and on the 20th October the defendant took out a summons, calling upon the plaintiffs to show cause why all further proceedings should not be stayed upon payment of the debt and costs indorsed upon the writ of summons. This was heard upon the 24th, when the plaintiffs resisted it, upon the ground that only 63*l.* 13*s.* 5*d.* then remained due to them. It appeared that the action had been brought to recover the amount of certain bills of exchange, and that when they were given, the defendant had deposited some wine warrants with the plaintiffs as collateral security. He had also given them the following authority:

“ MESSRS. ARNOLD AND PIGEON.

“ Gentlemen,— I hereby authorize you to sell, by private sale or public auction, the under-mentioned cases of champagne, without any reserve, the proceeds to be appropriated towards the payment of my bills dishonored.

WM. R. GOODERED.”

A list of the cases was subjoined to the authority. After the writ issued the plaintiffs had sold the wine for 14*l.* 5*s.* 3*d.*, which reduced the amount to which they were entitled upon the bills to 63*l.* 13*s.* 5*d.* The defendant contended that the sale of the wine was fraudulent. It was proposed by the plaintiffs that an order should be made without prejudice to the defendant's rights with reference to the alleged fraudulent sale of the wine; but this was refused, and no order was

Arnold v. Goodered.

made upon the summons. On the 29th October a declaration was delivered, and in the particulars of demand 63*l.* 13*s.* 5*d.* only was claimed, credit being given for the amount realized by the sale of the wine.

Butt and *Bovill* now showed cause. The object of this rule was to compel the plaintiffs to accept a larger sum than was actually the amount of their debt, as claimed in the particulars, because that larger sum had been indorsed upon the writ of summons. A party cannot compel his opponent to take a larger amount than he chooses to claim. The wine, which was deposited as a part security for the bills, was not all sold at the time the summons issued; but in October all the wine had been sold, and then the plaintiffs had said, "We do not require you to pay the whole amount indorsed on the summons, but the amount of the bills less the wine sold." If the defendant thought he could substantiate a charge of fraud against the plaintiffs, that might still be done, as the 63*l.* 13*s.* 5*d.* would be accepted without prejudice. The defendant had let the four days go by after the issuing of the writ, and the proper course now was to pay the money into court. The judge having refused to make an order, when it was quite discretionary with him to do so, the court would not interfere.

Pearson, contra. A judge's discretion at chambers must be exercised according to law, or else all appeal from his decisions would be stopped. The affidavits disclosed facts of a suspicious nature with respect to the sale of this wine. The defendant only asked by this rule that he might pay the plaintiffs all that was indorsed upon the writ. *Gover v. Elkins*, 3 M. & W. 216; *Acwood v. Read*, 7 Dowl. 810.

[ERLE, J. Have you found any authority for saying that a creditor is under an obligation in law to take more than he deems himself entitled to?]

If the creditor misled his debtor by the statement upon the summons, he should be estopped from denying that to be the correct sum due to him. The law of tender was analogous to such a case, and if a man tenders more than he ought to pay it is good. *Wade's case*, 5 Rep. 115 a. Credit cannot be given for a set-off in order to compel the other party to set off his debt.

[ERLE, J. But here is a deposit with a power of sale.]

It would not be safe to plead payment under these circumstances; it is rather a set-off, and might be pleaded as money had and received to the use of the defendant.

ERLE, J. This rule ought to be discharged, and with costs. I am of opinion the judge was right. At the time when the parties were before him, the defendant was applying for that which was entirely a discretionary matter on his part, viz. to stay an action if the plaintiffs were paid that which was due to them. A creditor has a right to say, "The amount due is so much, and I will take no more;"

Commerell v. Beaucherk.

and a debtor has no right whatever to say, "No; you have named a sum in your writ, and that sum only I will pay you, and no less." That really was the question before the judge; he acted according to law, and in a matter within his discretion, and did that which I myself should have done had I been in his place. Upon the rights of the defendant to bring an action, or otherwise proceed against the plaintiffs, I do not throw out any opinion. If the defendant had paid only the 63*l.* 13*s.* 5*d.*, he still had the opportunity of trying the *bona fides* of the sale, as he would not have been prejudiced by the payment.

Rule discharged, with costs.

COMMERELL v. BEAUCLERK.¹

November 26, 1851, and January 12, 1852.

Outlawry — Reversal by Writ of Error — Special Bail — 4 & 5 Will. & M. c. 18, s. 3.

The defendant, an outlaw, in an action for a debt exceeding 20*l.*, appeared by attorney, and brought a writ of error to reverse the outlawry, on the ground that he was abroad at the time of the exigent. Judgment of reversal was signed thereon:—

Held, that the defendant was bound to put in special bail on signing the judgment of reversal; and as he had not done so, the judgment must be set aside as irregular.

THIS was a rule calling upon the defendant to show cause why a judgment of reversal of outlawry, obtained upon a writ of error, should not be set aside for irregularity. The facts and arguments of this case sufficiently appear from the judgment.

Bovill showed cause, and cited 2 Arch. Pr. 1148; *Harvey v. O'Meara*, 7 Dowl. 725; *The Bank of England v. Reid*, 7 M. & W. 159; *Sexton v. Astrop*, 1 Dowl. N. S. 14; *Serecold v. Hamson*, 2 Str. 1178; *Have-lock v. Geddes*, 12 East, 622; *Porter v. O'Meara*, 7 Dowl. 658; 5 Bing. N. C. 626; and 1 & 2 Vict. c. 110.

Lush, contra, cited 4 & 5 Will. & M. c. 18, s. 3, and *Day v. Pau-pierre*, 14 Jur. 40.

Cur. adv. vult.

January 12. ERLE, J., now delivered the following judgment:— In this case the defendant, being outlawed, appeared by attorney, and brought a writ of error to reverse the outlawry, on the ground that he was abroad at the time of the exigent; and after verdict finding that fact, he signed judgment of reversal upon a side-bar rule. The plaintiff below obtained a rule *nisi* for setting aside that judgment of reversal, on the ground that the defendant was bound to put in special bail on signing judgment of reversal, he having appeared by attorney,

Commerell v. Beaucherk.

and the action having been brought for a debt exceeding 20*l.*, and process of outlawry having been properly resorted to, to compel appearance; and I am of opinion that the rule should be made absolute. The defendant appeared by attorney to reverse the outlawry, under the 4 & 5 Will. & M. c. 18, s. 3, authorizing appearance by attorney to reverse outlawry without bail, in all cases except where special bail is required by the court; and as special bail was required by the court at the time of that statute in such a case as the present, I think it ought to be required now from a defendant who comes in under its provisions. In *Serecold v. Hampsey*, 12 East, 624, in *notis*, it is decided, in a case similar to the present, that the proper course for a reversal is by rule to show cause why judgment of outlawry should not be reversed on putting in special bail. And Denison, J., states, that the practice of reversal before the Statute of William III. was by putting in special bail; and he points out that the right to special bail from an outlaw is distinct from the right to arrest on *mesne* process, and not affected by the statute requiring an affidavit to hold to bail. In *Havelock v. Geddes*, it was assumed by the counsel on both sides, and assented to by the court, that an outlaw on reversal ought to put in special bail, if the action was for a debt of a given amount; and many authorities are collected showing that to have been the course of law. The point to be decided was, whether the recognizance should be absolute to pay, or, in the alternative, to pay or render; and the language of Lord Ellenborough, in his judgment, that no terms can properly be imposed when judgment of reversal is pronounced as at common law, must be construed with reference to that point. The judgment decides that the term of an absolute recognizance to pay cannot be imposed, unless the outlaw comes in under some statute authorizing that term to be imposed; the judgment leaves the right to a recognizance in the alternative as it stood before at common law. It is not necessary for me, in coming to this judgment, to consider whether the decision in *Harvey v. O'Meara*, that an outlaw, since the statute for the abolition of arrest on *mesne* process, has a right to reverse the judgment on entering a common appearance, conflicts with these authorities, and with the judgment of Lord Abinger in *The Bank of England v. Reid*, and with the principle that more security should be required from a debtor who has stood out to outlawry, than from a debtor who appears at first; because in *Harvey v. O'Meara*, the outlaw appeared in person, and was in England, and was not shown to be going abroad, so as to be subject to an order for a *capias*. Here the outlaw appears by attorney, and is still abroad, and would be liable to arrest if he were in England with intent to return abroad; so that, unless special bail is required, process of outlawry would be nugatory if the defendant has no property within the jurisdiction of the court liable to be taken into execution. Upon these grounds I think the judgment of reversal without special bail was irregular; and as the plaintiff moved for a rule to set it aside without delay, he is entitled to make his rule absolute.

Rule absolute.

Ex parte Williams.

*Ex parte WILLIAMS.*¹

Bail Court, November 17, 1851.

Summons to appear before Justices — What Service sufficient.

■ A summons to appear at eleven o'clock on the 2nd April, before justices of the peace, at a place eight miles off, was left with the wife of W. on the morning of the 1st April, but after W. had gone to work as a collier. He was absent till eleven o'clock the same night, when the summons was first brought to his notice. Failing to appear, he was convicted, and sentenced to a month's imprisonment: —

Held, that the question of the sufficiency of the service of a summons was a matter upon which the justices were the proper parties to decide.

Semle, such service was sufficient.

In this case, Thomas Williams, a collier, had been summoned before the justices of the county of Monmouth, to answer the complaint of one Thomas Jones, for an assault. It appeared from the affidavits, that on the 1st April of the present year, Williams had gone to his work at an early hour in the morning, and that between eight and ten o'clock of the same day his wife was served with a summons for him to appear at eleven o'clock the next day (2nd April) before the justices sitting in petty sessions at a place eight miles distant from the residence of Williams. The wife explained to the constable who brought the summons, that her husband could not attend, as he would not be home till late at night. He did not return till eleven o'clock the same night; and it was further sworn, in his affidavit, that he could not attend in pursuance of the summons, because it was necessary for him, before leaving his work, to put another person in it; and he believed that if he had left his work without giving a reason, he might have been sent to prison for neglect. He was, however, convicted of the assault in his absence, and sentenced to a month's imprisonment. At the next sessions, held on the 16th April, he appeared before the justices, and gave the above explanation of his absence, but he was told he could not then be heard, as his case had been disposed of on the day when the summons was returnable; and he was then committed to prison for the month.

Huddleston now moved for a *certiorari* to bring up the conviction, upon the ground that the justices had no jurisdiction, by reason of the summons having been improperly served. By the 11 & 12 Vict. c. 43, s. 2, justices have power to proceed *ex parte* when proof is given before them of the proper service of the summons; but if the summons is not served in a reasonable time, the court will inquire, upon affidavit, into the circumstances of the service. *Ex parte Rice Jones*, 1 Lownd. M. & P. 357. Justices have jurisdiction only when the summons has been served a reasonable time before the hearing.

[ERLE, J. Why would not a message do, instead of his going to work? I question whether the sufficiency of the service of a sum-

¹ 15 Jur. 1060; 21 Law J. Rep. (N. S.) M. C. 46.

Young v. The Master, &c. of Clare Hall.

mons at ten o'clock in the morning, to appear the next day at eleven, is not a matter entirely for the justices to decide upon. Is there not an appeal against a conviction for an assault?]

No; the justices have power either to convict summarily, or to send the case to the sessions. Here the defendant says that he could not have left his work in time, and he attended the next sessions and explained the circumstances which had prevented him from attending at the sessions to which he had been summoned.

ERLE, J. Where by a summons a party is required to attend before justices, they are the proper persons to decide upon the sufficiency of the service of such summons; that is the general rule. It seems to me that this summons was served a reasonable time before the hearing. A messenger might have been sent to the colliery or to the justices. The additional facts brought forward by the defendant are not sufficient to show that the justices acted without jurisdiction, especially as, in a case before the full court, they have decided that a similar service is sufficient.

Rule refused.

YOUNG v. THE MASTER, FELLOWS, AND SCHOLARS OF CLARE HALL.¹

November 11, 1851.

Tithe Commutation Act—Payment for Tithes and Glebe—Invalid Modus.

The question raised under the Tithe Commutation Act, 2 & 3 Will. 4, c. 100, being, whether a modus or yearly sum of 20*l.* was payable to the rector of W. in satisfaction and discharge of all the tithes in R., and was become indefeasible by virtue of the statute, the jury found that the 20*l.* had been paid quarterly during the statutable period, not for the tithes alone, but partly for tithes and partly for glebe; and it was proved, that after the disabling statutes the rector of W. had been in possession of glebe lands in R.:—

Held, first, that by such finding it was clear that the sum of 20*l.* was not payable in lieu of tithes in R.

Secondly, that in such finding and evidence there was no sufficient proof of any valid modus or payment in lieu of tithes in R.

THIS was a feigned issue, brought under the 46th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, &c., in which the third issue was, whether, during the statutable period, of two incumbencies and three years, including sixty years in all, &c., there had been payable by the occupiers of the lands in the hamlet of Risby, to the rector for the time being of the parish of Walesby, a moiety of 20*l.* per annum, payable quarterly, in respect of tithe, &c. The cause came on for trial, before Jervis, C. J., at the Lincolnshire Summer Assizes, 1850, when a verdict was found for the defendants, subject to the following special case:—Risby is a hamlet in the parish of Walesby, and for a considerable time past the lands in the hamlet have been in the occu-

¹ 16 Jur. 81; 21 Law J. Rep. (N. S.) Q. B. 12.

Young v. The Master, &c. of Clare Hall.

pation of one person, as lessee or tenant of the defendants. Tithes were always payable in kind for the rest of Walesby parish, but for a period greatly exceeding the period prescribed by the statute 2 & 3 Will. 4, c. 100, no tithes in kind have been rendered for Risby. It did not appear at what time tithes ceased to be payable in kind in that hamlet, but for the period aforesaid a yearly sum of 20*l.* has been received by the rectors of Walesby for the time being, from the lessees or tenants for the time being of the lands of the defendants situate in Risby; and the main question of fact raised at the trial was, whether this 20*l.* had been paid during the statutable period in satisfaction and discharge of tithes alone, as was contended by the defendants, or in respect of tithes and glebe, as was contended by the plaintiff.

Evidence was given on the part of the plaintiff as to the origin of this payment, by the production of a number of terriers, from the year 1579 to the year 1823, inclusive. In several of the earliest of those terriers no mention was made of any money payment in respect of Risby, or of any tithes in kind rendered therefrom; and it appeared that there existed a considerable number of distinct pieces of glebe land in that hamlet. The greater part of the lands in Risby appear from the terriers to have been uninclosed at that time, and the glebe land lay dispersed in various parts of the open fields; and in six of the earlier terriers, from 1579 to 1674, the glebe lands in Risby are very minutely described. In the next terrier, dated 1697, it is stated that the toftstead and glebe in Risby had been compounded for the term of fifty-seven years, at 20*l.* per annum, paid quarterly, and that the glebe was about fourteen acres, as appeared by ancient terriers; but particular situations and boundaries are not stated in that or any subsequent terriers, but reference is occasionally made to the ancient terriers, as containing a description of the glebe lands. In the next terrier, dated 1700, it is stated that the parsonage glebe of Risby was not presented, because there was then a legal composition for the glebe and tithes of Risby; but the amount is not mentioned. But in the next terrier (1703) the same statement appears, except that the amount of the composition is stated to be 20*l.* per annum. In the next terrier, dated 1709, it is stated that Risby was a hamlet exempt from tithes upon a composition, which is stated to be 20*l.* per annum; and then follows a statement that there were no prescriptions belonging to any lands or farms. In the next terrier, dated 1718, it is stated that Risby was a hamlet exempt from tithes, upon a composition of 20*l.* per annum. The next terrier is without date, but in the same terms, and is signed by the same incumbent as the terrier next mentioned, which is dated 1724. In that it is stated that Risby was a hamlet exempt from tithes at present, upon a composition of 20*l.* per annum; and also that there had been formerly glebe land there likewise, and that there was no proof left of the legality of the composition. In the next terrier, dated 1730, it is stated that there were no glebe lands that could be found in Risby, and that Risby tithe was paid by a composition of 20*l.* per annum, but whether legal was doubted. And then follows:—“Mem.—Myself have discovered something in relation to Risby, in an old register book, under the year 1640, which

Young v. The Master, &c. of Clare Hall.

says, 'This year the composition made for Risby glebe and tithe commons, 20*l*.' " In the last terrier put in evidence at the trial, dated 1823, it was stated that Risby had paid a composition of 20*l*. in lieu of all tithes; and that in the terrier of 1724 it was stated that there was no proof left of the legality of the composition. The terrier of 1823 further stated that the rector had obtained an opinion as to the claim of Risby to an exemption from tithes, but that, as the opinion held out uncertain prospects of success, he did not think it advisable to try the question.

It was further proved on the part of the plaintiff, that the Rev. John Whitcombe, (the first of the three successive incumbents named in the issue,) held the living from the year 1767 to 1803, and the plaintiff's counsel tendered in evidence an account book kept by him during the whole of his incumbency, containing receipts and payments by him relative to the living of Walesby; and, amongst other things, entries of the payment of the yearly sum of 20*l*. in respect of Risby during the whole period of his incumbency. The counsel for the defendants objected to the admissibility of this book in evidence; but the court received it, subject to the objection, and the entries relative to the receipt of the 20*l*. were read. In a small number of these entries the 20*l*. was stated simply as a payment, without stating for what it was made; but in the great majority of the entries it was stated to be a payment of the glebe and tithes of Risby; and this was the case with respect to the entries in the latter portion of Mr. Whitcombe's incumbency, up to the year 1802, inclusive. Mr. Whitcombe was succeeded by the Rev. Thomas Robert Malthus, who was instituted in 1803, and held the living till 1834, when he died, and the plaintiff was presented and instituted, and has held the living from thence to the present time.

On the part of the defendant, at the trial, evidence was given of a verbal statement by Mr. Whitcombe to one Israel Brice, who afterwards occupied the lands in Risby for more than twenty years, on a negotiation between him and Mr. Whitcombe for the lease by Mr. Whitcombe to him of all his glebe lands, tithes, and tithe payments accruing to him in right of his benefice; that he had always received 20*l*. as a modus for the tithes of Risby; and that he, Brice, could receive no more: and evidence was also given of various payments of the 20*l*. by tenants of the defendants to Mr. Malthus, or to the lessee of the tithes, and various receipts for them were produced and received in evidence, in some of which the payment was termed "a modus for Risby tithe;" in others, "a tithe composition;" but in none of these receipts was there any reference to the glebe. It was also proved that the plaintiff had continued to receive the 20*l*. for upwards of three years after he had become the rector; and it was contended on the part of the defendants, that there was good proof of the payment having been made for the full period of time prescribed by the statute as necessary to render it valid and indefeasible, namely, for two successive incumbencies and three years of a third, the whole period exceeding sixty years; and that the origin of the payment was immaterial; and that even if it had been originally made in respect of the glebe as

Young v. The Master, &c. of Clare Hall.

well as the tithe in Risby, yet that the evidence (exclusive of Mr. Whitcombe's account book,) was sufficient to establish, that during the full statutable period it had been rendered as a payment in respect of tithe alone; or that even if this were not so, and it had been paid in respect of the tithe and something else, the payment was nevertheless rendered valid by the statute.

The plaintiff, on the other hand, contended that not only did the evidence show that the payment had originally been made in respect of the glebe, which had become lost to the rector, as well as the tithe, but that it was proved by Mr. Whitcombe's book, that during his whole incumbency it was paid and received, not for tithe alone, but for glebe and tithe, and that without Mr. Whitcombe's book there was no sufficient evidence of any payment during a large portion of the statutable period; and that in either point of view the plaintiff is entitled to a verdict.

The Lord Chief Justice put two questions to the jury—first, whether they were of opinion that the 20*l.* had been paid quarterly during the requisite statutable period; and, secondly, if so, whether it had been paid in respect of tithe and glebe, or in respect of tithe alone. The jury found, first, that the 20*l.* had been paid quarterly during the requisite period; and, secondly, that it had been so paid partly for tithe and partly for glebe, and not for tithe alone. Upon this finding, the Lord Chief Justice directed the verdict to be entered for the defendants, with liberty to the plaintiff to move to enter a verdict for the plaintiff on the third issue, as stated in the commencement of this special case. The two other issues, which varied from the third in stating the payment to have been made yearly and half-yearly, became immaterial, in consequence of the jury finding that the payment had been made quarterly, as alleged in the third issue.

The questions for the opinion of the court are, first, whether, upon the above finding of the jury, the verdict upon the third issue should be entered in favor of the plaintiff or the defendants; and, secondly, if the court should be of opinion that the plaintiff is entitled, upon the above finding, to have the verdict entered for him upon such third issue, whether Mr. Whitcomb's account book was properly received in evidence on the trial. If the court should be of opinion, that, upon the finding of the jury, the plaintiff is entitled to have the verdict entered for him, but that Mr. Whitcombe's account book was not properly received in evidence on the trial, then it is agreed that a *venire de novo* shall be awarded.

The plaintiff's point for argument was, that the alleged modus or annual payment of 20*l.* was not rendered valid by the stat. 2 & 3 Will. 4, c. 100, because, although it was in fact paid during the statutable period, the jury have found that it was so paid, not for tithes alone, but partly for tithes and partly for glebe. The following were the defendants' points for argument:—First, that an invariable yearly sum of 20*l.* having been regularly actually paid by quarterly payments to the rector of the parish of Walesby, by the occupiers of the lands of Risby, within the said parish, in lieu and satisfaction of tithes and glebe, under the circumstances stated in the case, for a

Young v. The Master, &c. of Clare Hall.

period of time far exceeding that prescribed by the stat. 2 & 3 Will. 4, c. 100, the lands of Risby are, by the effect of the provision of that statute, discharged of the residue of tithes in kind. Secondly, that a modus or yearly payment is not excluded from the protection of the stat. 2 & 3 Will. 4, c. 100, by reason that the consideration for it is not exclusively confined to tithes. Thirdly, that the books of a deceased rector are not evidence for his successor to prove the consideration for payments received by him in right of his benefice.

Whitehurst, (with him *Hayes*,) for the plaintiff. The question is, whether, upon the finding of the jury, the court is not bound to direct that the verdict should be entered for the plaintiff upon the third issue; and it is submitted that the court is bound. In *Toymbee v. Brown*, 3 Exch. 117, it was a question whether a payment received by the rectors of 80*l.* per annum was a valid composition. The objection taken to the validity was, that the 80*l.* had been paid, not only for tithe, but also for the giving up by the rectors of certain rights of common. The answer given by the court was, that although the giving up of the right of common was stated to be a part of the consideration for the agreement to pay 80*l.* per annum in lieu of tithes, yet that the case found that the sum of 80*l.* had always been both paid and received expressly as a modus or compensation for the tithe only. It follows, that, if the case had found otherwise, the court would have decided otherwise. But here the jury have found otherwise, and therefore the decision of the court must follow the decision of the jury.

Mellor, for the defendants. Notwithstanding the finding of the jury, the modus insisted upon by the defendants was valid. The objection taken to it is, that it is invalid because the payment is found to have been made, not only for tithe, but for the giving up by the rector of the use of certain glebe land. But it is submitted that such an objection is untenable. The only effect of the Statute of Limitations, 2 & 3 Will. 4, c. 100, is to substitute, in the proof of the time during which the modus has been acted on, the sixty years from the time of proceeding, for the first year of Richard I; so that, when it is shown that the payment of the modus has lasted more than sixty years, the only question remaining is, whether the modus would have been a good one if made before the time of legal memory. *Fellowes v. Clay*, 4 Q. B. 313; 7 Jur. 343. The only question, therefore, in the present case, is, whether, before the time of legal memory, there could have legally been a modus payable, not only in lieu of tithes, but also in respect of the rector giving up the use of glebe land. But certainly before the disabling statutes, the rector, with the consent of the patron and ordinary, might have aliened the glebe land, or have demised it for any number of years. It follows that he might have entered into an agreement to accept a yearly payment for the consideration of not insisting upon the use of glebe land. The word "modus" means only an agreement between the rector and his parishioners liable to ecclesiastical dues. A modus is no less a valid agreement, exempting an occupier from the payment of tithe, because it also exempts

Young v. The Master, &c. of Clare Hall.

him from the adverse claim of some other right on the part of the rector. In *Thorpe v. Plowden*, 14 M. & W. 520, an agreement that the rector should hold certain land as glebe, and should receive 40*l.* per annum in consideration of giving up certain other land formerly glebe, and releasing all right to tithe, was held to be a valid composition.

[COLERIDGE, J. It does not appear, in that case, that any part of the money payment to be assessed upon the occupiers in the parish was to be payable in respect of the rector giving up the use of glebe land. There money and land were to be given for tithe and glebe. It is not there shown that any of the money was in lieu of the glebe.]

Yes, it is shown by the calculations of Lord Cottenham, C., when the case was in the House of Lords.

[PATTESON, J. The money paid by way of modus is collected from all the occupiers in the parish. By this agreement, therefore, if there were occupiers of lay lands in the parish, as well as the occupiers of the glebe lands supposed to be given up by the rector, the lay occupiers would be, in fact, paying to the rector a rent, in respect of the glebe lands, for the occupiers of the glebe. Can that be a lawful modus?]

If the agreement called a "modus" is such an agreement as a rector before the time of legal memory, and therefore before the disabling statutes, might have legally made, then it can be enforced. *Bennett v. Read*, 3 Eaq. & Y. 1347. But before the disabling statutes the rector might have aliened or demised the glebe, and therefore the introduction of such a demise or alienation into the present modus, which is proved to have been in existence longer than the statutable period, does not invalidate the modus. The modus is not open to any one of the objections to a modus enumerated in 1 Eaq. on Tithes, 486.

Whitehurst, in reply. The question has been argued as if the proposition were, whether there had or had not been a valid modus in the parish of Walesby; but the proposition is not so large; it is whether there was or was not a valid modus of 20*l.* payable in lieu of tithe, that is, whether, by a valid modus, the sum of 20*l.* had been, during the statutable period, payable in respect of tithe, and of tithe only. If the 20*l.* was payable in respect of tithe, and something else, then the proposition was to be answered in the negative. When the finding of the jury determined that the payment of 20*l.* had been made, not only in respect of tithe, but of tithe and glebe, then the proposition to be supported by the defendants was negatived, and the plaintiff was entitled to succeed. Even supposing the question had been whether there had been a valid modus, still the plaintiff must have succeeded, because no payment made for any thing but for tithe can be considered a modus. The term "modus" means a money payment in lieu of tithe, and of tithe only. There may be other agreements between a rector and his parishioners, but they are included in the term "composition," and not in the term "modus." Again: even though such an agreement as has been suggested could have lawfully

Young v. The Master, &c. of Clare Hall.

been made before the disabling statutes, yet here the defendants could not succeed, because it was shown by the evidence that the rectors of Walesby were in possession of the glebe lands after the disabling statutes were passed.

LORD CAMPBELL, C. J. I am of opinion, the jury having found that the payment was partly for tithe and partly for glebe, and not for tithe only, that, according to the terms of the issue, the verdict ought to be entered for the plaintiff. The only argument which could have been rendered plausible in support of entering the verdict for the defendants has been most ingeniously presented to us; but, I think, without success. It is, that the *modus* in question must be taken to be a valid one, because it is in the terms of such an agreement as might have been legally made, before the disabling statutes, between a rector, with the consent of his patron and ordinary, and his parishioners paying tithe. But even supposing such an agreement could have been legally made before the disabling statutes, yet, in order to prove it binding in this case, it was necessary to show that the glebe lands in Risby had really been transferred to the landowners of that place; for it is impossible to say, if the present incumbent of Walesby can, notwithstanding the supposed agreement, now recover all the glebe lands in Risby, that the supposed payment, payable in respect of that glebe as well as of tithe, is valid. But it certainly was not shown that the glebe was legally transferred; on the contrary, it was shown, that, after the disabling statutes, the glebe was still in the hands of the rectors, and that it was well known as glebe land. It is clear that no rector could afterwards have transferred it, and that the present rector's title to the glebe in Risby cannot be disputed. In that case, it is quite clear that he cannot legally have both the glebe and this payment, which the jury have found to have been hitherto made, not only in respect of tithe, but of glebe also. In other words, the agreement, by whatever name it may be called, was not shown to be valid in law; and the payment, not being valid in lieu of the glebe, is no more a valid payment in lieu of the tithe.

PATTESON, J. The payment in question has been set up as a *modus*, and must be therefore shown to be a valid payment in that form. But in order to show that, it must be shown to be a valid *modus* at common law; the modern statute has made no difference in the legal requisites of the validity of a *modus*—it has only altered the time of proof of its continuance. But no such *modus* as this was ever heard of at common law. It is to be observed that the agreement which has been here suggested is not set up as a positive agreement made between the rector and a particular occupier, as was the case in *Thorpe v. Plowden*, 14 M. & W. 520, but the payment is said to have been in virtue of a *modus*—that is, an agreement is to be assumed between the rector and all his tithe-paying parishioners, that, in consideration of his transferring to certain parties his glebe lands, all the occupiers of other lands would pay him 20*l.* per annum forever. It is impossible to suppose any such agreement between the

Regina v. The Inhabitants of Waverton.

rector and the occupiers in his parish. In *Thorpe v. Plowden* there was a positive agreement proved between a rector and a particular person, that in consideration of the rector giving up certain glebe lands, and releasing that person from the payment of tithe, that person would convey to the rector other lands, and insure him a perpetual annuity of 40*l.*; and it was held in that case, not that the payment of 40*l.* was a modus in lieu of tithes, but that the agreement was a composition within the meaning of the term "composition" in the 2nd section of stat. 2 & 3 Will. 4, c. 100. No question of modus was at all touched by that case; and it cannot therefore be cited as an authority to show that the payment now in question was a valid *modus decimandi*, or payment in lieu of tithe.

COLERIDGE, J. It seems to me that the court is concluded by the finding of the jury, both in regard of the particular terms of the issue, and of the more general question which has been started. Upon the more general question, the argument of the defendants depends entirely upon whether the payment in question can be called a valid modus. But when it is found that the payment was made and received, not only in respect of tithe, but also in respect of glebe, and when it is not even shown that such glebe was ever aliened, I cannot think that it is shown that there ever was a valid *modus decimandi*. The payment in question was, if any thing, nothing more than a rent for the use of glebe land.

Judgment for the plaintiff.

REGINA v. THE INHABITANTS OF WAVERTON.¹

November 21, 1851.

Indictment for Non-repair of Highway—Misdescription of Part out of Repair—Defective averments in second Count cured by Reference to first.

The first count of an indictment for the non-repair of a highway alleged, "that a certain part of the highway, situate in the township of W., leading from and out of the highway from the village of W. towards M., at or near a place called Parkside, on the said last-mentioned highway," (describing it, and stating its length and breadth,) "was ruinous, and in decay," and that defendants of right ought to repair it. The second count alleged, that the inhabitants of the township of W. had immemorially repaired the highways situate within it, and "that the said part of the same common highway hereinbefore mentioned to be ruinous, &c. as aforesaid was a common highway" which, but for the said prescription, would be reparable by the parish at large; and that, by reason of the premises, defendants "ought to repair the same part of the said highway, so being ruinous, &c. as aforesaid, when and so often as it hath and shall be necessary, and that defendants had not repaired the same." It appeared that there was no place called Parkside on the road in question, but that the place intended was called Parkgate. Defendants were acquitted on the first count, and found guilty on the second:—

¹ 16 Jur. 16; 21 Law J. Rep. (N. S.) M. C. 7.

Regina v. The Inhabitants of Waverton.

Held, First, that the misdescription of the part of the road alleged to be out of repair was immaterial.

Secondly, on motion to arrest the judgment, that though the second count did not in itself sufficiently charge that the part of the road was out of repair, it did so by its clear and distinct reference to the first count.

Also, that the part of the road out of repair having been alleged in the first count to be in the township of W., the second count was sufficient by reference to the first, without a repetition of the allegation.

INDICTMENT for the non-repair of a highway. The first count stated, that before &c., to wit, on &c., there was a certain common queen's highway in the county of Cumberland, and that a certain part of the said highway, situate, lying, and being in the township or district of Waverton, otherwise called Waverton "High and Low," in the parish of Wigton, in the county aforesaid, called the "Yevens" highway, leading from and out of the highway from the village of Waverton towards the town of Maryport, in the county aforesaid, at or near a place called "Parkside," on the said last-mentioned highway, and extending from thence towards and unto the highway leading from Lesson Hall towards the town of Ireby, in the county aforesaid, at or near Waterside, in the township or district of Waverton aforesaid, and containing in length 1356 yards or thereabouts, and in breadth four yards or thereabouts, on &c., at &c., was and is yet very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment of the same, so that the liege subjects of our lady the queen could not go, return, pass, repass, &c., to the great damage and common nuisance of &c. Averment, that the inhabitants of the said township have been used to repair, and of right ought to repair, that part of the highway aforesaid; and that the defendants had not repaired. The second count stated, that within the parish of Wigton aforesaid, in the county aforesaid, from time whereof &c., there have been and still are divers townships or districts, whereof the township or district of Waverton, High and Low, is one, and that the inhabitants of the said township of Waverton have been used to repair the highways situate and being within the township or district of Waverton aforesaid, as would otherwise be reparable and amendable by the inhabitants of the said parish at large; and that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which but for the said prescription or usage would be reparable and amendable by the inhabitants of the said parish of Wigton at large; and that by reason of the premises the inhabitants of the township or district of Waverton aforesaid, in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the same part of the said common highway, so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary; and that the defendants had not yet done the same. The third count was similar, alleging a prescriptive liability to repair in the several townships or districts of the parish of Wigton. Plea, not guilty. On the trial, before Williams,

Regina v. The Inhabitants of Waverton.

J., at the Summer Assizes for the county of Cumberland, it appeared that there was no place called Parkside on the road in question, but that the place intended was called Parkgate. It was contended for the defendants that this was a misdescription of the road. The learned judge overruled the objection, and the defendants were acquitted upon the first count, and found guilty upon the second and third counts, leave being reserved to move to enter a verdict of not guilty upon those counts. In this term, (November 4.)

Knowles moved for a rule *nisi* accordingly, and in arrest of judgment.—First, though it is not necessary to name the termini, yet, being matter of description, if they are named, it is necessary to prove them. *Rex v. St. Weonard's*, 6 Car. & P. 582; *Rex v. Great Camfield*, 6 Esp. 136.

[LORD CAMPBELL, C. J. There may be a distinction between the termini of the highway set out in the indictment, and the termini of that part of it alleged to be out of repair. If the mistake is in the termini of the highway set out as being within the parish, then there is no such highway; but if it be proved that there is such a highway as is described in the indictment, it is less material that it should be correct as to the particular part of it out of repair.]

It is important to state the part of the highway out of repair, otherwise the defendants do not know what part of it the verdict binds them to repair.

[WIGHTMAN, J. That inconvenience applies to a general statement of a certain number of yards being out of repair; these indictments always run in that form.

LORD CAMPBELL, C. J. Suppose 100 yards of a highway a mile long are out of repair, and there are no names of the termini of those 100 yards, it must be enough to state that 100 yards of the highway are out of repair.]

Further: Parkside is part of the description of the highway itself. Secondly, the second count does not charge that the highway is out of repair, nor does it state that the part of it alleged to be out of repair lies within the township of Waverton, unless that is to be collected by the reference in it to the first count. [He also moved for a rule *nisi* for a new trial upon affidavits, on the ground that Waverton High and Waverton Low were two distinct townships.]

The Court refused a rule for a new trial, or for entering a verdict for the defendants upon the second and third counts, but granted a rule for arresting the judgment on the second and third counts, on the ground that they did not show any offence committed by the defendants in allowing any part of the road to be out of repair. On a subsequent day in this term,¹

S. Temple and *Pickering* showed cause. First, the second count

¹ November 13, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

Regina v. The Inhabitants of Waverton.

contains an allegation "that the same part of the said common highway hereinbefore mentioned to be ruinous, deep, miry, and in decay, was a common highway, which, but for the said prescription or usage, would be reparable by the parish at large." That is a sufficient allegation that the highway is out of repair. Also the words "so being ruinous &c. as aforesaid" are, by referring to the first count, an allegation that the highway was ruinous during all the time mentioned in the indictment. *Posterne v. Hanson*, 2 Wms. Saund. 60 c, and 61 m, note 9, 6th ed.; *Rex v. Aylett*, 1 T. R. 63; *Regina v. Craddock*, 2 Den. C. C. 31; s. c. 1 Eng. Rep. 563. The first count may be referred to for this purpose; because every count is not a separate indictment for all purposes. *Regina v. Craddock*, 2 Den. C. C. 31; s. c. 1 Eng. Rep. 563. But if the first count cannot be referred to, the words "so" and "as aforesaid" may be rejected as having no meaning, and then there is sufficient allegation that the road was out of repair. (First objection in *Rex v. Boyall*, 3 Burr. 832, 834.) [They also cited *Rex v. Somerton*, 7 B. & Cr. 463.] Secondly, the second count is sufficient after verdict, by the Statute of Jeofails. *Stennel v. Hogg*, 1 Saund. 228, note 1. The defendants have been found guilty of not repairing when necessary; and that verdict could not have been given without evidence of the road being in the township of the defendants, and of its being out of repair. In *Regina v. Waters*, 1 Den. C. C. 356; 13 Jur. 130, which was an indictment for murder, a defective statement of an act of misfeasance, by which the death was alleged to have been caused, was held to be supplied by the verdict.

Knowles, Atherton, and Unthank, contra. First, where an offence is stated defectively a verdict will cure the defect, but a verdict will not aid a statement which does not charge an offence. *Regina v. Waters*, 1 Den. C. C. 356; 13 Jur. 130. In *Rex v. Aylett*, 1 T. R. 63, Lord Mansfield said, (p. 69,) "It is necessary in every crime that the indictment charge it with certainty and precision, alleging all the requisites which constitute the offence."

[LORD CAMPBELL, C. J. In that case Lord Mansfield was speaking of a perfect indictment, not of an indictment after verdict.]

Further: though reference may be made from one count to another for some purposes, there is no case in which a substantial part of the charge has been made out by a reference to a preceding count. The words "so being ruinous" mean to describe the part of the highway intended by the prosecutor, and are equivalent to "so stated to be ruinous." There ought to be an averment that the highway was out of repair at the time of the indictment. *Sir Nicholas Poynts's* case, Cro. Jac. 214; fourth exception in *Johnson's* case, Id. 610; *Rex v. Hazell*, 13 East, 139; Patteson, J., in *Regina v. Martin*, 9 Car. & P. 215, cited by Parke, B., in *Regina v. Waters*, 1 Den. C. C. 356, 360; 13 Jur. 130, 131. Again: the allegation is merely a conclusion of law. Further: there is no allegation that the highway is in the township of Waverton.

[LORD CAMPBELL, C. J. In the first count there is an allegation

Regina v. The Inhabitants of Waverton.

that a certain part of the highway is in the township; and the second count proceeds upon the supposed want of repair in the said part of the said highway.] *Cur. adv. vult.*

LORD CAMPBELL, C. J., now delivered the judgment of the court. The second and third counts of the indictment in this case are drawn very inartificially, but we think after verdict they may be supported.

The allegation, to which our attention was directed when the motion was first made for arresting the judgment, certainly does not sufficiently charge that the road was out of repair, viz. "that the said part of the same common highway hereinbefore mentioned to be ruinous, &c. as aforesaid, was a common highway which" &c. This is only a description of the highway, and not an allegation that it was actually out of repair. But there follows an allegation that the inhabitants of the township "ought to repair and amend the same part of the said common highway, *so being ruinous, &c. as aforesaid*, when and so often as it hath been and shall be necessary, and that the said inhabitants of the said township have not yet done the same." Here we have a clear and specific reference to the first count, which contains a formal allegation that this part of the highway was out of repair. There are many authorities to show that one count of an indictment may refer to another, and that, under such circumstances, the maxim applies, "*Verba relata inesse videntur*."

The objection that the second and third counts do not show the part of the highway out of repair to be in the township, admits of a similar answer. The first count alleges "that a certain part of the said highway, situate, lying, and being in the township of Waverton," &c., (describing it, and stating its length and width,) "was and yet is ruinous," &c.; and the second and third counts allege "that the said part of the same common highway hereinbefore mentioned to be ruinous," &c., was a highway which the inhabitants of the township were bound to repair. It has been determined that any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned." But the local situation of the part of the highway described must necessarily and invariably belong to it; and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation, that it is within the township, seems not to be strictly necessary.

We must very much regret the negligence in framing indictments which causes such discussions; but we are glad that in this case it has not led to a failure of justice. The rule for arresting the judgment must be discharged.

Rule discharged.

Orchard v. Moxsy.

ORCHARD v. MOXSY.¹

January 29, 1851.

Application for Costs after Summons dismissed at Chambers — Sect. 13 of Stat. 13 & 14 Vict. c. 61 — Lapse of two Terms.

On the 26th May, 1851, a judge at chambers made an order dismissing a summons by the plaintiff for costs, under sect. 13 of stat. 13 & 14 Vict. c. 61, the Court of Exchequer having decided that the section was permissive, not imperative. In Michaelmas vacation the Court of Common Pleas decided differently:—

Held, that an application by the plaintiff to this court for costs in Hilary Term, 1852, was too late.

TRESPASS for assault and false imprisonment. On the trial at the Middlesex Sittings after Easter Term, 1851, a verdict was given for the plaintiff for 40s. On the 26th May, 1851, an application was made to a judge at chambers, under section 13 of statute 13 & 14 Vict. c. 61, for an order directing that the plaintiff should recover his costs, when it appeared, from the affidavits, that the action was brought for a cause in which concurrent jurisdiction was reserved to the superior courts; and the judge made an order "that the summons to tax the plaintiff's costs herein, and for the defendant to pay the same, be dismissed — no costs." Thereupon the defendant's attorney offered the plaintiff's attorney the 40s. damages, which were accepted. On the 12th December following, the plaintiff made an application to the defendant for the costs, which was refused; and in this term, January 13,

Paterson obtained a rule calling upon the defendant to show cause why the plaintiff's costs should not be taxed, and why the defendant should not pay the amount. In Easter Term, 1851, the Court of Exchequer, in *Jones v. Harrison*, 15 Jur. 337; s. c. 3 Eng. Rep. 579, held that the provision in sect. 13 of stat. 13 & 14 Vict. c. 61, that in the cases therein specified "the court or judge may direct that the plaintiff shall recover his costs," was permissive, not imperative; but the Court of Common Pleas, at the Sittings in Banc after last Michaelmas Term, decided differently in *M^r Dougall v. Paterson*, 15 Jur. 1108; s. c. 7 Eng. Rep. 510.²

Sir *F. Thesiger*, (with him was *Phipson*,) *contra*. This application is too late; the whole matter was finally settled in May, 1851, by the order of the judge at chambers; and two terms have since elapsed before this rule was moved for.

The COURT then called upon

Paterson to support the rule. If the plaintiff is entitled to costs,

¹ 16 Jur. 124. ² In *Crake v. Powell*, where the same question was raised, this court delivered judgment on the 10th February, concurring with the Court of Common Pleas. (See post.)

Orchard v. Mossy.

his right depends upon the statute of Gloucester; and no statute limits the time within which the application should be made.

[LORD CAMPBELL, C. J. How long does the right continue? Ought you not to have claimed them within a reasonable time?

COLERIDGE, J. Suppose you had made an application to this court instead of to a judge at chambers, and this court, following the decision in the Exchequer, had discharged the rule, you could not have come again and made this application.]

In *Merrick v. Wakley*, 6 Jur. 803, a question as to the right of the plaintiff to costs was discussed three years after the trial.

[LORD CAMPBELL, C. J. In this case there has been a decision on the matter by a competent tribunal.]

The order of the judge was not so much a decision upon the construction of section 13 of statute 13 & 14 Vict. c. 61, as an order made upon the supposition that the statute gave him a discretion. Further: no judgment has been signed; the receipt of damages by the plaintiff is no bar to this application. A plaintiff may abstain from signing judgment for any length of time.

LORD CAMPBELL, C. J. I am of opinion, that this application is too late. The plaintiff accepted damages, reserving, as he might do, his right to make an application to this court for his costs; but he must make that application within a reasonable time. The plaintiff, merely on account of a different decision in the Court of Common Pleas from that which had been given in the Court of Exchequer, asks us substantially to reverse the judgment of the judge at chambers. Very inconvenient consequences would follow if we allowed this application, because it might be made at any distance of time, when the defendant might be no longer of ability to pay the costs.

I give no opinion as to whether I adhere to the decision in the Court of Common Pleas or that in the Court of Exchequer.

PATTESON, J., concurred.

COLERIDGE, J. The court must act on the general rule, that a party complaining of a decision of a judge at chambers must come speedily.

WIGHTMAN, J., concurred.

Rule discharged.

*Re JAMES HALL v. THE NORFOLK ESTUARY COMPANY.*¹

November 22, 1851.

Deed of Transfer of Shares void, Call being unpaid — 8 & 9 Vict. c. 16, s. 19 — Registration of Deed of Transfer.

On the 13th March, a shareholder in a joint-stock company, subject to the Companies Clauses Consolidation Act, 1845, executed a deed of transfer of his shares, and his broker lodged the deed of transfer with the secretary of the company for registration. The secretary refused to register it, on the ground that a call made upon the shares before the 13th March remained unpaid until the 14th April. Upon application for a mandamus to the secretary to enter and register a memorial of the deed of transfer:—

Held, that by sect. 16 of stat. 8 & 9 Vict. c. 16, the right to transfer shares was taken away until all calls made in respect thereof had been paid; and the deed of transfer was, therefore, void.

RULE calling upon the secretary of the Norfolk Estuary Company to show cause why a writ of mandamus should not issue, directed to him, commanding him to enter and register a memorial of a deed of transfer of twenty-four shares in the said company, in the name of Robert Wheble Bennett. It appeared from the affidavits in support of the rule, that the Norfolk Estuary Company was incorporated by stat. 9 & 10 Vict. c. 388, which enacted that the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, should be incorporated into and form part of it, and that the number of shares into which the capital of the company should be divided should be 10,000: that 2*l.* 10*s.* per share should be the greatest amount of one call which the company should make on the shareholders, and that one month's notice, at the least, should be given on each call: that Robert Wheble Bennett was possessed of twenty-four shares in the company, and on the 13th March last sold them to James Hall, and executed an assignment of them bearing that date: that the vendor's broker on the same day lodged the deed of transfer with the secretary of the company for registration: that on the said 13th March the vendor had paid all calls that had been made or were then due in respect of his said shares: that on the 27th May the attorney of the vendor wrote a letter to the secretary of the company, demanding that the deed should be registered in the name of the vendor: that afterwards the attorney of the vendor had an interview with the secretary, when he required the city address of the purchaser, and stated that no such person as James Hall could be found at the place described in the deed of transfer; whereupon the attorney of the vendor stated that James Hall still resided there: that on the 11th June the attorney wrote another letter to the secretary, stating that all the calls upon the shares had been paid up, and objecting to give a second address: that on the 13th June the attorney of the vendor saw the secretary, when the secretary declined to register the deed, and it was returned to the attorney without being registered. The affidavit of

Re James Hall v. The Norfolk Estuary Company.

the secretary of the company, in opposition to the rule, stated that on the 5th February last a call of 2*l.* 10*s.* per share was duly made by the directors of the company, pursuant to the powers of the acts of parliament enabling them in that behalf, upon all the shares in the said company, including the said twenty-four shares; and that on the said 13th March the said call in respect of the said twenty-four shares remained wholly due and unpaid up to the 14th April last.

Phipson showed cause. A shareholder in an incorporated company has no right to transfer his shares while any call duly made in respect thereof remains unpaid. Sect. 14 of stat. 8 & 9 Vict. c. 16, enacts that the transfer of shares shall be by deed; and by sect. 15, which requires the transfer of shares to be registered, a condition is superadded, that the vendor shall continue liable for calls "until such transfer has been so delivered to the secretary of the company as aforesaid." The intention of the legislature was, that no transfer of shares should be made by any person who was a defaulter in paying calls duly made.

[*COLERIDGE, J.* The question is, what is a transfer, as between the shareholder and the company? By sect. 17, a transfer made during the time when the transfer-books are closed shall, as between the company and the party claiming under the same, be considered as made subsequently to the execution of the deed of transfer.]

That shows that a specific enactment was necessary to make it so, and therefore, without an enactment to that effect, a transfer is made at the time of the execution of the deed. Sect. 18 shows that it was intended that the deed of transfer should transfer the interest in the shares.

[*COLERIDGE, J.* Sect. 16 enacts that "no shareholder shall be entitled to transfer any shares until he shall have paid such call;" it does not enact that the transfer deed, in such case, shall be a nullity. Are the company at liberty to take notice of the shareholder having done what he is not entitled to do?

PATTESON, J. The clause in sect. 15, "until such transfer has been so delivered to the secretary, the vendor of the shares shall continue liable to the company for any calls that may be made," contemplates a transfer made, but not delivered to the secretary. Sect. 16 may, perhaps, be satisfied by construing it to entitle the company to object to the registration of a transfer while the call remains unpaid.]

It was intended, that, as a means of compelling payment of calls duly made, a shareholder should be under a disability of dealing with his shares until the calls were paid.

[*COLERIDGE, J.* The purchaser is the proper person to require a memorial of the deed to be entered. Is the transfer complete before the deed is delivered to the transferee? If not, the calls were paid at that time.

WIGHTMAN, J. A deed is delivered when it is executed, unless it is delivered as an escrow.]

Wordsworth, contra. The provisions of stat. 8 & 9 Vict. c. 16,

Re James Hall v. The Norfolk Estuary Company.

were not intended to give the directors of the company the power of exercising a discretion as to registering a transfer of shares, but merely for the purpose of enforcing payment of the calls: they ought not to be construed so as to interfere with the transactions between party and party, and the rights of parties under a contract for the transfer of shares.

[WIGHTMAN, J. The parties may make a contract antecedent to the deed of transfer.]

Reading sect. 16 in conjunction with the latter part of the preceding section, it should be construed as enacting, that no shareholder shall be entitled to transfer, *as against the company*, any share after a call has been made; which would have the effect of making the act of transfer incomplete, as to the company, until the deed was registered: it would amount to saying that no shareholder shall be entitled to have his transfer registered until the call was paid. The interests of the company are fully protected by that construction. A person dealing with shares cannot know when a call has been made.

[He referred to *Ex parte Took*, 13 Jur. 930, and *Sales v. Blane*, 14 Jur. 87.]

[COLERIDGE, J. Is there any case in which a company have refused to register a memorial of a deed of transfer, on the ground that it was executed by a minor, or a person under incapacity?]

In *Stikeman v. Dawson*, 11 Jur. 214, which was before stat. 8 & 9 Vict. c. 16—and it does not appear what the enactment in the special act was—the sale of shares being by an infant, the company were required not to register the transfer; and in consequence of the difficulty thus created, the brokers for the purchaser repaid him the purchase-money, and brought their bill against the brokers for the vendor, and the father of the infant, and the infant himself; but that bill was dismissed by Knight Bruce, V. C. There was no application to a court of law.

PATTESON, J.¹ I do not mean to say that a contract for the sale of shares by a shareholder of a company, containing a clause that the purchaser shall pay the calls due and payable upon the shares, may not be a good contract, and that the purchaser may not compel the transfer of the shares under it. The question is, what is the meaning of the 16th section of stat. 8 & 9 Vict. c. 16, by which “no shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call.” What is the transferring of a share? By the 14th and 15th sections shareholders may sell and transfer their lands by deed, which is to be delivered to the secretary of the company, and a memorial thereof is to be entered by him in the register of shares; and the term “transfer” is explained by sect. 15, which says, that “until such transfer has been delivered to the secretary,” the vendor shall continue liable for calls: it treats the transfer and the deed of transfer as synonymous. I am of opinion that the legislature intended that no person

¹ LORD CAMPBELL, C. J., was in the Court of Criminal Appeal.

Re James Hall v. The Norfolk Estuary Company.

should be at liberty to transfer his shares in an incorporated company except by deed, and that he should not transfer them while any calls remained unpaid; and therefore, if a call remains unpaid at the time of the execution of a deed of transfer, the company may refuse to register it on the ground that it is invalid. The company may be put in considerable difficulty if they are compelled to register a deed of transfer which is not good. I think we must read the words of the act as meaning, that shares cannot be transferred until any call due upon them has actually been paid.

A different question would arise if the deed had been delivered as an escrow, to take effect upon payment of the calls by the transfer; but that question does not arise, because the deed was delivered to the broker, as agent of the purchaser, for the purpose of a memorial of it being registered. As between the vendor and purchaser, the deed was intended to be complete on the day of its execution, because it was taken by the broker of the vendor, as the broker of both parties, to the office of the secretary of the company, for the purpose of its being registered.

COLERIDGE, J. I am of the same opinion, though I come to that conclusion with reluctance; because, whatever good grounds the company may have for refusing to register the deed, this objection is purely vexatious and technical, and will not avail them hereafter if a fresh transfer deed of these shares is executed, and tendered for registration. The clauses of stat. 8 & 9 Vict. c. 16, were framed for the benefit and security of the company, and that is attained by preventing the existing shareholders from transferring their shares to incompetent persons. The 14th section enacts, that shareholders may transfer their shares "subject to the regulations herein contained:" one of which, mentioned in sect. 16, is, that "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof;" which is in effect saying, that during the time that the calls remain unpaid the right to transfer the shares is taken away, and therefore a deed of transfer of them is null and void. That it has that meaning may be further collected from the difference between the latter part of the 15th taken together with the 16th section and the 18th section. The 18th section, which provides for the devolution of shares in cases of intestacy, bankruptcy, insolvency, and marriage, assumes the interest to have passed, but still it gives no benefit to the party claiming by virtue of such transmission, until the transmission has been authenticated as therein required. That is very different from the language of sect. 16, which being read into the 14th section, takes away the right of the shareholder to transfer his shares at all, by deed, until he shall have paid the calls in respect thereof. Therefore, as between the parties, the transaction was complete on the 13th March; but as between the company and the purchaser, it was null and void in effect.

WIGHTMAN, J. I cannot come to any other conclusion, consistently with the words of the statute, which are very stringent. By

Driscoll v. Whalley.

sect. 15, until the transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share. The 14th and 15th sections treat the transaction as complete, and requiring nothing more to be done but the registration of the deed. But by sect. 16 "no shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call." The effect of that section is to disqualify the shareholder from making an effectual transfer while any calls due remain unpaid; and probably it was the intention of the legislature that he should labor under that disability; but that would be obviated by deferring to execute the deed of transfer until the calls were paid.

Rule discharged.

DRISCOLL v. WHALLEY.¹

January 29, 1852.

Judgment as in the Case of Nonsuit — Affidavit.

An affidavit sworn on the 16th January, in support of a rule for judgment as in case of nonsuit, stated that notice of trial was given for the sitting after Michaelmas Term preceding, and that the plaintiff did not proceed to trial in pursuance of his said notice:—

Held, sufficient.

Edgar v. Halliday, (1 Lownd. M. & P. 367) overruled.

A RULE had been obtained for judgment as in case of a nonsuit. The affidavit in support of the rule, which was sworn on the 16th January, stated that notice of trial was given for the sitting after the preceding Mich. Term, and that the plaintiff "did not proceed to the trial of this cause in pursuance of his said notice."

Maxwell showed cause. The affidavit is not sufficient: the statement in it, that the plaintiff "did not proceed to trial in pursuance of his notice," is a negative pregnant. The Court of Common Pleas held it insufficient in *Edgar v. Halliday*, 1 Lownd. M. & P. 367.

[LORD CAMPBELL, C. J. The Lord Chief Justice says, "When a party comes to the court at a distant time, when the interval between the alleged default and the application for judgment as in case of a nonsuit is so great that the plaintiff had ample opportunity of going to trial, I think that the defendant ought clearly to negative the plaintiff's having done so." I do not find that in that case the Court of Common Pleas drew any line as to the length of the interval of time when something more must be added in the affidavit.]

The affidavit does not follow the words of sect. 1 of stat. 14 Geo.

Regina v. Hammond.

2, c. 17, which empowers the courts to give judgment as in case of nonsuit when the plaintiff neglects to bring the issue on to be tried, "according to the course and practice of the said courts respectively."

[LORD CAMPBELL, C. J. The affidavit ought to give reasonable satisfaction to the mind of the court that the plaintiff did not proceed to trial according to the correct practice of the court; but it need not do more.]

The affidavit should be so clear and distinct that perjury may be assigned upon it. In *Duck v. Barton*, 1 Lownd. M. & P. 201; 14 Jur. 153, an affidavit to deprive the plaintiff of costs under sect. 129 of stat. 9 & 10 Vict. c. 95, which stated that the plaintiff dwelt within twenty miles from the defendant, was held insufficient as not showing distinctly that the defendant dwelt within twenty miles from the dwelling-place of the plaintiff.

[LORD CAMPBELL, C. J. In that case there was nothing in the affidavit to show within what distance the parties dwelt.]

Phipson, contra, was not heard.

LORD CAMPBELL, C. J. I am of opinion that the affidavit is sufficient to call upon the plaintiff to convince the court that he has gone to trial.

PATTESON, COLERIDGE, and WIGHTMAN, JJ., concurred.

The rule was discharged, upon the plaintiff giving a peremptory undertaking to try at the first sittings in next Easter Term.

REGINA v. WILLIAM HAMMOND.¹

January 26, 1852.

Election of Councillor—5 & 6 Will. 4, c. 76, s. 32—Meaning of "Place of Abode" of Candidate in Voting Paper.

At the time of an election of town councillors for the borough of Y., W. H., a candidate, resided with his family in High-street, and carried on the business of a miller in Church-road, having a mill there. His place of residence and place of business were both in the parish of G., and within the limits of the borough. A certain number of the voting papers, necessary for his due election, described him as "W. H., of Church-road, G., miller." He was as well known by his place of business as by his place of residence. In *quo warranto* against W. H., upon an issue whether the voting papers in question contained the place of abode of defendant:—

Held, that sec. 32, of stat. 5 & 6 Will. 4, c. 76, which required the voting papers to state the "place of abode" of the candidate, meant "the place of residence."

INFORMATION in the nature of *quo warranto* against William Hammond, for claiming to use and exercise the office of a councillor of the

¹ 16 Jur. 194.

Regina v. Hammond.

borough of Great Yarmouth. The plea stated that the borough of Great Yarmouth was divided into six wards, under the provisions of stat. 5 & 6 Will. 4, c. 76, and that one of the said wards was called and known as the "Gorleston and Southtown or St. Andrew's Ward;" and that, at an election of two councillors for the said ward on the 1st November, 1850, the burgesses of the said ward entitled to vote did elect and choose the defendant to be a councillor of the said borough, &c. Replication, first, that the said burgesses in the said plea in that behalf mentioned, entitled to vote as therein in that behalf mentioned, did not, according to the provisions of the said act, elect or choose the defendant to be a councillor of the said borough in manner and form, &c. Conclusion to the country. Secondly, that the several burgesses of the said Gorleston and Southtown or St. Andrew's Ward, in the said plea in that behalf mentioned, entitled to vote as therein in that behalf mentioned, who, to a certain number, to wit, to the number of 170, on the occasion on which the defendant is supposed to have been elected, as in the said plea mentioned, voted for the defendant to be a councillor of the said borough, and by whom it is in and by the said plea supposed that the defendant was elected and chosen to be a councillor of the said borough, so voted for the defendant to be a councillor of the said borough by on that occasion delivering, and for the purpose of so voting on that occasion delivered, voting papers in that behalf to H. F., W. M. B., and J. R., being, and who respectively were, such aldermen as in the said plea appointed as therein mentioned, and such assessor and deputy assessor as therein mentioned: that the said voting papers, which, on the occasion last aforesaid, were delivered as aforesaid for the purpose of on that occasion voting for the defendant to be a councillor of the said borough, did not, nor did any of them, contain the place of abode of the defendant, being the person for whom the last-mentioned burgesses voted as aforesaid to be a councillor of the said borough: that the said voting papers in this plea mentioned contained erroneous, false, and untrue statements of the place of abode of the defendant, and stated as the place of his abode what was not in fact, the place of his abode, in this, to wit, that the place of abode of the defendant was and is in and by the last-mentioned voting papers stated to be Church-road, Gorleston; whereas, in truth and in fact, the place of abode of the defendant before and at the time when the said burgesses in the said plea in that behalf mentioned did assemble as in the said plea mentioned, and before and at the time of the delivery of the said voting papers to the said persons as aforesaid, and also at the time of the defendant being, as in and by the said plea is supposed, elected as aforesaid, was at High-street, in the said borough of Great Yarmouth, in the said county of Norfolk, and not at Church-road, Gorleston, as aforesaid, or elsewhere than at High-street aforesaid; that Church-road, Gorleston, and High-street were situated in the ward called the Gorleston and Southtown or St. Andrew's Ward: that Church-road, Gorleston, aforesaid, was, at the time of the delivery of the said voting papers and of the said last-mentioned election, and still is, distant divers, to wit, 186 yards from High-street aforesaid, and

Regina v. Hammond.

that Church-road, Gorleston, aforesaid, was not then, nor is now, the same place with or as High-street aforesaid, but then was and still is another and different place. Verification. Rejoinder to the second replication, that the said voting papers in the said replication mentioned did, and every of them did, contain the place of abode of the defendant, and did, and every of them did, state as the place of abode of the defendant what was, in fact, at the time of the delivery of the said voting papers and of the defendant being elected as in the said replication mentioned, the place of his abode. Conclusion to the country. Issue thereon.

On the trial, before Pollock, C. B., at the Summer Assizes for Norfolk, in 1851, the defendant having put in the return of the aldermen and assessors that the defendant was duly elected a councillor of the borough, and the declaration by the mayor to the same effect, it was contended for the prosecution that the burden of proof upon the second issue was upon the defendant, and that he ought to produce the voting papers. The Lord Chief Baron held that the defendant had proved sufficient by showing the return. The counsel for the prosecution then put in the voting papers mentioned in the replication, which described the defendant as of Church-road, Gorleston, miller; and it was proved that the house in which the defendant resided with his family was in High-street, Gorleston, and that there was no sleeping-room in the mill. The Lord Chief Baron directed the jury, that if they believed that the mill in Church-road was the place where the defendant carried on his principal business, it might be described as his place of abode within sect. 32, of stat. 5 & 6 Will. 4, c. 76. The jury found that the defendant was as well known by that description as by his place of residence, and a verdict was accordingly entered for the defendant. In the following Michaelmas Term, November 4,

Worlledge obtained a rule *nisi* for a new trial on the ground of misdirection, citing *Regina v. Deighton*, 1 Dav. & M. 682, on stat. 7 Will. 4 and 1 Vict. c. 78, s. 14; and *Allen v. Greensill*, 4 C. B. 100; 11 Jur. 476, on stat. 6 & 7 Vict. c. 18, s. 17.

In this term,¹

O'Malley and *Couch* showed cause. Section 32 of statute 5 & 6 Will. 4, c. 76, requires the voter to deliver a voting paper, containing the names of the persons for whom he votes, "with their respective places of abode and descriptions." The words "place of abode" may mean place of business, as in the Reg. Gen., M. T., 15 Car. 2, which required that an affidavit to hold to bail should state "the true place of abode." *Haslope v. Thorne*, 1 Man. & S. 103; *Alexander v. Milton*, 2 Cr. & J. 424. A notice of action to justices under stat. 24 Geo. 2, c. 44, s. 1, which requires the place of abode of the attorney intending to sue out process to be stated, is sufficient if it states the place of

¹ January 13, before LORD CAMPBELL, C. J., PATTESON and COLERIDGE, JJ. WIGHTMAN, J., went to chambers soon after the commencement of the argument.

Regina v. Hammond.

business of the attorney; *Roberts v. Williams*, 2 C. M. & R. 561; 5 Tyr. 583; and Lord Abinger there states, 2 C. M. & R. 563, that the practice under the act for Uniformity of Process, 2 & 3 Will. 4, c. 39, s. 14, where the same expression is used, had been to state the place of business. [They also cited *Johnson v. Lord*, Moo. & M. 444, upon the 7 & 8 Geo. 4, c. 53, s. 114.] *Regina v. Deighton*, 5 Q. B. 896; 1 Dav. & M. 682; 8 Jur. 686, does not give any meaning to the words "place of abode." The only object of section 32 of stat. 5 & 6 Will. 4, c. 76, is, that the burgesses should designate the persons for whom they vote, for the purpose of identifying them, not for the purpose of showing their qualification, and that object is attained at least as certainly by stating the place of business as by stating the place of residence. The duty of the mayor and assessors under section 35 is to count the voting papers; they cannot inquire into the qualification of the persons voted for. [They referred to sections 25 and 28.] In sect. 17 of stat. 6 & 7 Vict. c. 18, the act for the registration of voters for members of parliament, which requires notice of objection to be given to, or left at the place of abode of, the voter, there is a reason for requiring the residence to be stated, as was decided in *Allen v. Greensill*, 4 C. B. 100; 11 Jur. 476. By sect. 9 of stat. 5 & 6 Will. 4, c. 76, a person resident within seven miles from the borough on the last day of August may be a Burgess, and so qualified to be elected councillor; whereas by a proviso in sect. 79 of stat. 6 & 7 Vict. c. 18, the voters for members of parliament for cities and boroughs must be resident within seven miles at the time of polling; and in counties persons may vote where they are resident, if the property in respect of which they are qualified is in a different district.

[COLERIDGE, J. You must construe "place of abode" to mean either place of business or residence, so that the voter may state either.]

A person abides both where he sleeps and where he is conversant during the day. *Shields v. Outhberston*, Barnes, 162, upon the Statute of Additions, cited in Com. Dig., "Abatement," F. 25. [They referred to section 10 of stat. 8 & 9 Vict. c. 16, which directs that in the "Shareholders' Address Book" the "places of business" of the shareholders of the company being corporations, and of the other shareholders the "places of abode," shall be entered.¹]

Worlledge, contra. The court will determine the meaning of the words "place of abode" in sect. 32 of stat. 5 & 6 Will. 4, c. 76, by looking to the statute. Sect. 32 makes a distinction between what

¹ On showing cause against the rule for a *quo warranto* in Hilary Term, January 29, 1851, if the place of abode meant residence, it was further contended that, Gorleston being the place of residence of the defendant, the insertion of "Church-road," instead of "High-street," was an inaccuracy which was cured by the enactment at the end of sect. 142 of stat. 5 & 6 Will. 4, c. 76.

But the court, (LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.) considered that it was a false description, not an inaccurate description, and therefore sect. 142 of stat. 5 & 6 Will. 4, c. 76, did not apply.

See *Regina v. Coward*, 15 Jur. 726; s. c. 5 Eng. Rep. 801.

Regina v. Hammond.

is to appear in the voting paper with reference to the candidate, and what is to appear with reference to the voter: it requires "the place of abode" of the candidate to be stated, and the situation of the property for which the voter is qualified to vote. By section 9, three things must concur to entitle a person to be on the burgess list, and so qualified to be a councillor; and one of these things is residence within seven miles of the borough. [He also referred to section 17, and the forms of notice of claim and notice of objection in the schedule, (Nos. 2 and 3.) In sections 121, 127, and 131, the words "place of abode" mean residence. In *Regina v. Deighton*, 1 Dav. & M. 682; 5 Q. B. 896; 8 Jur. 686, it distinctly appeared that the place of business of the candidate was stated in the voting paper; and if the court had thought that sufficient, they might have given judgment for the defendant upon the whole record. In *Lockett v. Knowles*, 2 C. B. 187; 10 Jur. 99; and *Allen v. Greensill*, 4 C. B. 100; 11 Jur. 476, the place of abode and the residence of the voter were treated as synonymous. In the clause (sect. 101) of stat. 6 & 7 Vict. c. 18, as to the service of notices on overseers, their place of abode, or office, or other place for transacting parochial business, are mentioned separately.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. In this case we are required to put a construction on the words "places of abode" in the 32d section of stat. 5 & 6 Will. 4, c. 76, which enacts, that "every burgess, entitled to vote in the election of councillors, may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors a voting paper containing the Christian names and surnames of the persons for whom he votes, with their respective *places of abode* and descriptions." At the time of the election in question, of town councillors for the borough of Great Yarmouth, the defendant resided with his family in High street, and he carried on the business of a miller in Church-road, having a mill there. His place of residence and place of business are both in the parish of Gorleston, and within the limits of the borough of Great Yarmouth. A certain number of the voting papers for him described him as "William Hammond, of Church-road, Gorleston, miller." If his place of abode is properly stated in these voting papers, according to the act of parliament, he was duly elected a councillor; but otherwise he was not, and the verdict in his favor must be set aside.

After an attentive consideration of the act of parliament, we are of opinion that by *place of abode* it means the *place of residence* of the candidate.

Such is the usual meaning of this expression. In Johnson's Dictionary "abode" is defined to be "habitation, dwelling, place of residence," and "residence" is defined to be "place of abode, dwelling." A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full sense of that expression; and if this be stated to be his place of abode, no doubt nor difficulty can occur. In some instances he may be quite as well known if described

of the place where he carries on his business; but this is never his place of abode in the ordinary sense of the expression, and he may have a place of business to which he goes very rarely, and which may be known to few as belonging to him.

It was urged that the object of this enactment was to designate the individual for whom the vote is given, by requiring the voting paper, along with his name and surname and description, to contain his place of abode; but surely this does not show that his place of business may be stated, instead of his place of residence; for, the place of residence being mentioned, no doubt can exist as to the individual for whom the vote is intended to be given. The defendant's counsel did not venture to contend that a statement of the place of residence would not be sufficient. They must, therefore, say that a choice is given to state, in the voting paper, either the residence of the candidate, or his place of business; and if he has several places of business, any one of them which the different voters think fit to select. But this latitude might lead to confusion and errors in summing up the votes, and the object of the legislature, as contended for on the part of the defendant, will be more effectually gained by considering that the language employed is used in its ordinary sense.

Wherever the expression "place of abode" occurs in this act of parliament, it will be satisfied by the meaning of "place of residence;" and in some places where it occurs, as in sects. 121 and 127, and in schedule (D. 2), referred to by sect. 17, it will admit of no other meaning. We are bound to suppose that it is used in the same sense throughout the whole statute.

Reg. v. Deighton, 5 Q. B. 896; 1 Dav. & M. 682; 8 Jur. 686, was relied upon by the counsel for the relator as an express decision upon the meaning of the expression "place of abode" in this section of the act of parliament; but there the rejoinder admitted that the defendant's *place of abode* had not been truly stated in the voting papers, and merely averred that he was so described in the voting papers without any fraud, and that the description so given of him was as well known as if his place of abode had been mentioned. The judgment of the court against him proceeded upon the ground that his place of abode had not been mentioned in the voting papers, and the court did not there decide that his place of business could not be considered his place of abode.

On the part of the defendant reliance was placed on *Roberts v. Williams and another*, 2 C. M. & R. 561; 5 Tyr. 583. That case turned on the stat. 24 Geo. 2, c. 44, which requires notice of action to be indorsed with the name of the attorney intending to sue out process, "together with his place of abode." The court held, that an indorsement stating the attorney's *place of business* was sufficient within that act: principally, it appears, because the information intended to be furnished under that act was, the place where the attorney, as such, and acting in such character, was to be found; and the decision is manifestly inapplicable to the case of the abode of an individual, merely as such, independent of any profession or business.

The defendant's counsel likewise referred to the cases in which it

Hawcroft v. The Great Northern Railway Company.

has been held, that an affidavit describing the deponent of his place of business is enough, where by rule of court he should be described as of his place of abode. These cases only prove that for some purposes the place of residence may be the place of abode, and, they are of little use to show the meaning to be given to the words in the Municipal Corporation Act.

There is, however, a statute in *pari materia*, the Registration of Voters Act, 6 & 7 Vict. c. 18, and in construing this act the learned judges of the Court of Common Pleas seem to have been of opinion, that where it uses the words "place of abode" it means *place of residence*. *Lockett v. Knowles*, 2 C. B. 187; *Allen v. Greensill*, 4 C. B. 100; 11 Jur. 476.

We have been much pressed by the fact, in the present case, that the defendant was as well known by his place of business as by his place of residence; but if we were to hold that the place of business is sufficient, we must lay down a general rule upon the subject, which, if unqualified, would in many instances defeat the object of the legislature; and if qualified with the condition that the candidate is as well known by his place of business as by his place of residence, might lead to great uncertainty and much litigation.

We think it the safer and better course to conclude that the legislature used the words in their plain and ordinary sense, and required that the voting paper shall contain the candidate's place of residence, by which in all cases he may easily be identified.

For these reasons we think that the verdict for the defendant must be set aside, and the rule for a new trial made absolute.

Rule absolute.

COUNTY COURT APPEAL.

HAWCROFT v. THE GREAT NORTHERN RAILWAY COMPANY.¹

February 11, 1852.

Railway Company — Excursion Tickets — Special Contract.

Excursion tickets were issued by the G. N. Railway Company, at B., to convey passengers to L. and back, by any train advertised for that purpose, within the following fourteen days. B. was not on the line of the G. N. Railway Company, but on that of the S. Y. Railway Company, which joined the other line at D. Two trains a day (morning and evening) were then advertised for the conveyance back from L., in pursuance of the notice on the ticket, but B. was not mentioned in the advertisement as one of the stations at which either of those trains would stop, although D. was so mentioned. H., who had taken one of the tickets at B., and had been conveyed to L., returned within the fourteen days by one of the evening trains, and on arriving at D. the next morning found that there was no train for B. on that day. He posted to B., and sued the company for the expense of so doing:—

Held, that he was entitled to recover.

Semle, a railway company are not excused from carrying passengers according to their contract, upon the ground that there is no room for them in the train; but, in order to avail themselves of this answer, they should make their contract conditional upon there being room.

¹ 16 Jur. 196. *Coram* PATTESON, and WIGHTMAN, JJ.

Hawcroft v. The Great Northern Railway Company.

APPEAL from the County Court of Yorkshire, holden at Barnsley. The action was brought to recover damages for the alleged neglect and refusal of the defendants to convey the plaintiff from London to Barnsley. It appeared from the case that the following facts were proved or admitted on the trial:— During the period of the Great Exhibition in Hyde-park the defendants were in the habit of issuing tickets for the conveyance of passengers by the Great Northern Railway, from various places on the line of such railway, to London and back, at a low price, by certain tickets, called "excursion tickets." On the 2nd August, 1851, the plaintiff, who is a confectioner residing at Barnsley in Yorkshire, purchased one of these tickets at the Barnsley station, for which he paid 5s. and which was in the following form:—

"GREAT EXHIBITION.

"Barnsley to King's Cross and back.

"*Third Class.*"

And upon the back of such ticket was the following notice:—

"*Excursion Ticket.*

"To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof."

The defendants advertised certain trains, called "Exhibition trains," as those which would leave the King's Cross station during the month of August, for the conveyance from London of persons holding excursion tickets. The hours at which the trains would arrive at various places on the line of railway were mentioned in the advertisements. Barnsley was not among such places, but the times when they would arrive at Doncaster were mentioned, and a passenger travelling by the defendants' railway from London to Barnsley would proceed to Doncaster, and be conveyed from thence to Barnsley by a train of the South Yorkshire Railway Company, the Barnsley station being situate on the South Yorkshire Railway, and not upon the line of the Great Northern, the South Yorkshire joining the Great Northern at Doncaster: but it was agreed and admitted on the trial, that for the purposes of this action the ticket should be deemed and taken to have been issued by the authority, and as the ticket, of the defendants. The plaintiff, on Saturday, the 9th August, still being the holder of the ticket, presented himself at the King's Cross station, at London, shortly before 6 o'clock, in time for the train at 6.45 A. M., for the purpose of returning to Barnsley by the train which was advertised to start at that hour, and which train was admitted to be one of the trains referred to in the ticket. This train left the King's Cross station for the places mentioned in the advertisements, but in consequence of the great pressure of persons wishing to be passengers by it, the plaintiff was unable, although he used every effort to do so, to obtain a seat. The plaintiff then applied to and requested the station-master, who was admitted to be the servant and agent of the de-

Hawcroft v. The Great Northern Railway Company.

defendants, to forward him to Barnsley by a train which was leaving shortly after, but he refused to do so, and told the plaintiff that he must wait for another train. The plaintiff proceeded on the same day by the advertised excursion train, which left the King's Cross station at 9.15 P. M., having been kept waiting there from before 6 A. M. This train proceeded to Doncaster, where it arrived on Sunday morning. No trains were run upon Sunday by the South Yorkshire Company, and the plaintiff, therefore, hired a carriage to convey him to Barnsley. The learned judge decided that there was a special contract between the plaintiff and the defendants, and he ruled that the latter were bound to carry back the plaintiff from London to Barnsley by the train advertised to leave London at 6.45 A. M., or by some other train within a reasonable time after that hour, and that it was not a sufficient compliance with their contract to bring him from London by the train at 9.15 P. M.; and further, that even assuming the not enabling him to leave London until 9.15 P. M. was not a breach of contract, yet they were guilty of a breach in conveying him only as far as Doncaster, and not to Barnsley, and that the defendants were liable for not performing their contract. The defendants had thereupon brought the present appeal.

Phipson, (*Wordsworth* with him,) for the appellants. This is a question of construction, and turns wholly upon the form of the excursion ticket. It is admitted that the ruling of the judge of the county court would be correct if the ticket is to be read as an absolute contract to carry passengers by any train on any day, without any limitation.

[WIGHTMAN, J. The words "on any day" mean on any of the days for which trains are advertised that the plaintiff pleases.]

Assuming that the plaintiff has the option of choosing his day, has he the option of choosing any train on that day?

[WIGHTMAN, J. But you limit him to go by the trains advertised for that purpose.]

Two excursion trains went each day. The company might take him by either. They were bound to carry him back only by the trains advertised; there was no train advertised for Barnsley at the hour on which the plaintiff started.

[WIGHTMAN, J. This was a train advertised for the purpose of conveying back excursion-ticket holders. They know nothing of advertisements relating to trains on the South Yorkshire line. The respondent may have learned the hours from another advertisement than that which contained the names of the places. He had no right to return by other trains than those which were advertised, but he was not bound to see how far they went. He would conclude that the appellants had taken care to make all necessary arrangements with the South Yorkshire Railway Company.]

Barnsley was not mentioned in any of the advertisements. Could the company be sued if they had refused to carry a passenger when there was no room for him? They were common-carriers, and bound to carry safely.

Regina v. Percy.

[PATTESON, J. They should have made it a condition of their contract that they would not carry unless there was room.]

Hardy, (with him *Hall*), for the respondent, was not called upon.

PATTESON, J. The question turns upon the meaning of the contract contained in the ticket. The language used is, "to return by the trains advertised for that purpose;" that means, to return back to Barnsley, where the ticket was taken. The advertisement says nothing as to the time of arrival at Barnsley, and being silent, the plaintiff might well suppose that he would be taken there in a reasonable time after his arrival at Doncaster. If any other arrangement was entered into, and it was shown to have been brought to the knowledge of the respondent, the result might be different. An option is given to the party who is to return, whether he will go by the morning or evening train. But as the company could not take him by the morning train, they should have made some arrangement to carry him on to Barnsley by the evening one.

WIGHTMAN, J. The whole question is, what was the contract between the parties? The party taking the ticket had no right to return except by the trains advertised for that purpose, but he had a right to insist upon going by one of those; and it may be, that, by going by one of them, he waived any right to object that he had not been carried by a former one. He certainly ought to have been taken back to Barnsley, unless he was a party to some special arrangement to the contrary.

Judgment affirmed, with costs.

REGINA v. PERCY.¹

January 24, 1852.

Form of Bastardy Order when no Evidence is tendered by Defendant—8 & 9 Vict. c. 10, Sched. No. 8—Corroborating Evidence—7 & 8 Vict. c. 101, s. 3.

A case from the Quarter Sessions set out a bastardy order, under sect. 1 of stat. 8 & 9 Vict. c. 10, which omitted the following words in form 8 of the schedule—"and having also heard all the evidence tendered by the defendant;" and found that no evidence was in fact tendered by the defendant. The case also set out the evidence which was given to corroborate that of the mother:—

Held, First, that the order was good, without alleging that no evidence was tendered by the defendant.

Secondly, that whether the evidence corroborated that of the mother, was a question for the justices, under sect. 3 of stat. 7 & 8 Vict. c. 101; and therefore, unless it was incapable of doing so, this court would not quash the order.

¹ 16 Jur. 193.

Regina v. Percy.

ON appeal to the April Quarter Sessions for the county of Northampton, in 1851, against an order of justices made at a petty session holden in and for the division of Daventry, in the said county, whereby the defendant was adjudged to be the father of a bastard, and adjudged to pay 2s. weekly for the support of the said child, the quarter sessions confirmed the order, subject to a case. The order recited, "And we having, in the presence and hearing of the said Thomas Percy, heard the evidence of such woman, and such other evidence as she hath produced; and the evidence of the said A. M. the mother of the said child, having been corroborated in some material particular by other testimony, to our satisfaction, do hereby adjudge" &c. It was in the first instance contended that the order was bad in point of form, as it did not correspond with the form No. 8, given in the schedule of the act 8 & 9 Vict. c. 10. The principal objection urged and relied on was, that the words "and having also heard all the evidence tendered by —, the said —," and which in the said statutory form are printed in italics, were omitted, and that there was nothing to show that the justices had heard, or had refused to hear, the evidence tendered on behalf of the putative father. The justices in quarter sessions, having found that no evidence was in fact tendered or given on behalf of the said Thomas Percy before the justices at the petty sessions, refused to quash the order, and the case proceeded. The evidence of the mother of the child and of her sister, which was a conversation between her and the defendant, was set out: this conversation was capable of being construed as containing an admission by the defendant, that he was the father of the child. The Court of Quarter Sessions confirmed the order, subject to the opinion of this court on the following questions:—First, whether the order was a good order in law, pursuant to the provisions of stat. 7 & 8 Vict. c. 101, and 8 & 9 Vict. c. 10, and whether the said objection was valid. Secondly, whether the evidence given by the said A. M. was or was not corroborated in some material particular by the other witness, the said J. M., who was called on behalf of the said respondent.

Cockle, in support of the order of sessions. First, in the schedule to stat. 8 & 9 Vict. c. 10, No. 8, a form of order of bastardy is given when application is made by a woman after birth, but sect. 1 only demands substantial conformity with it. Secondly, it is a question for the justices whether the evidence was corroborating: the evidence set out may be so.

S. Flood, contra. First, the justices should have excused the omission of the words in question. *Regina v. The Duke of Grafton*, 12 Jur. 539. [He also cited *Regina v. Read*, 9 Ad. & El. 619.] It is left in uncertainty whether any evidence was tendered by the defendant or not. The note (g) to the form in the schedule provides for a specific case, in which the words are to be left out, viz., "should the defendant not appear himself, or by attorney or counsel;" and *expressio unius est exclusio alterius*.

Regina v. Pearcy.

[LORD CAMPBELL, C. J. May not the legislature have intended that the form should be altered so as to square with the fact? The legislature impliedly provides the form for the case in which there is evidence.]

Secondly, the evidence set out does not corroborate that of the mother.

LORD CAMPBELL, C. J. I am of opinion that the order should be affirmed; it is good on the face of it, and there is abundant corroboration of the evidence of the mother.

It was not the intention of the legislature to impose the necessity of using the words, the omission of which is objected to, in cases where no evidence was tendered or given by the defendant. This order is a true record of the proceedings before the magistrates. In *Regina v. Read*, 9 Ad. & El. 619, there was a departure from the form provided by the statute, in a material particular; therefore the statute was not substantially pursued. In *Regina v. The Duke of Grafton*, 12 Jur. 539, the party might have appeared and disappeared, and the evidence might have been given in his absence. In this case it may be fairly inferred, from the omission of the words in question, that no evidence was tendered by the defendant.

As to the question whether there was evidence in corroboration of the mother, the 3rd section of stat. 7 & 8 Vict. c. 101, requires that the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the justices. Looking at the evidence set out, we may well suppose that it did corroborate the evidence of the mother to their satisfaction.

PATTESON, J. As to the first question, the legislature has not in express terms provided for the case in which no evidence is given by the defendant. Note (g) to form No. 8, in the schedule, contemplates an order being made *ex parte*; and nothing is required by the form which is not inserted in this order. We must presume that the magistrates did their duty, and would have heard the evidence if any had been tendered by the defendant. If such evidence was tendered, the order, though good on the face of it, would be bad on appeal, for stating what was not the fact. The case of *Regina v. Read*, 9 Ad. & El. 619, does not apply.

Secondly, the evidence of the mother is to be corroborated in some material particular to the satisfaction of the justices, not to our satisfaction.¹

Order confirmed.

¹ Coleridge, J., was in the Court of Criminal Appeal. Erle, J., had gone to chambers.

Regina v. Aldham and United Parishes Insurance Society.

REGINA V. ALDHAM AND UNITED PARISHES INSURANCE SOCIETY.¹

November, 10, 1851.

Friendly Society — 10 Geo. 4, c. 56, s. 9 — *General Meeting* — *Public Notice* — *Signature of Officer.*

The members of a friendly society having duly agreed to and signed a requisition for convening a general meeting, to take into consideration the propriety of rescinding or altering the rules of the society : —

Held, (ERLE, J., *dissentiente*,) that the signature of "the secretary or president or other principal officer or clerk of such society," required by 10 Geo. 4, c. 56, s. 9, was merely a formal act, and that one of such officers was bound to sign the public notice necessary to convene the meeting, in compliance with the requisition.

[*The Queen v. Bannatyne*, 2 L. M. & P. 213; s. c. 4 Eng. Rep. 188, *dissented from*.—EDS.]

THIS was a rule calling upon the president, secretary, or other principal officer, of the Aldham and United Parishes Insurance Society, to show cause why a mandamus should not issue to compel them, or one of them, to sign a public notice to convene a general meeting of the society, for the purpose of taking into consideration the propriety of rescinding or altering the rules of the society.

From the affidavits in support of the motion for the rule it appeared that the rules of the society had been duly enrolled and certified, and that at a meeting of upwards of two hundred members a requisition was agreed to and duly signed by members present, calling upon the president, vice-president, and secretary of the society to convene a general meeting; that such requisition had been delivered to those officers, and that they had declined to comply with it.

The rule was obtained under the 9th section of the 10 Geo. 4, c. 56, which provides, "that no rule confirmed by the justices of the peace in manner aforesaid shall be altered, rescinded, or repealed, unless at a general meeting of the members of such society as aforesaid, convened by public notice, written or printed, signed by the secretary or president, or other principal officer or clerk of such society, in pursuance of a requisition for that purpose by seven or more of the members of such society," &c.

Pashley now showed cause. A discretion is given by the 9th section of the act in question to the officers mentioned, and one object of the section was, that such discretion should be entrusted to several persons, any one of whom may call a meeting.

[LORD CAMPBELL, C. J. Do you think the legislature meant that if the other officers refused to act, the clerk might do so?]

That must have been intended; otherwise, why name the clerk? In *The Queen v. Bannatyne*, 2 L. M. & P. 213; s. c. 4 Eng. Rep. 188, Erle, J., in refusing a rule exactly like the present, said, "It appears to me that the members have no legal right to demand the signature of the officers to their requisition; that the legislature intended to prevent the rules from being altered unless one of

¹ 21 Law J. Rep. (N. S.) Q. B. 1.

Regina v. Aldham and United Parishes Insurance Society.

the chief officers would sign the requisition, and that it has been left to these officers to decide whether it is their duty to give their signature or not."

Peacock, on behalf of the secretary, stated that he was ready to act in whichever way the court might decide.

Hawkins, in support of the rule, was not heard.

LORD CAMPBELL, C. J. I entertain the most profound respect for the opinion stated to have been given in *The Queen v. Barnatyne*. But it appears to me clear that it was the intention of the legislature to require that one of the officers named should sign the notice calling a meeting of the members to revise the rules, and that it was not intended to give power to the officers to withhold an opportunity of a revision by refusing their signature, which is merely to authenticate the fact that the requisition has been signed by seven members. The words of the 9th section are, "by the secretary or president, or other principal officer or clerk of such society," and the repeated use of the word "or" is very strong to show that the signature of the officers named was intended to be merely a formal act on their part. It could hardly have been intended that if the president declined to give his consent to the calling of the meeting, the clerk should have a discretionary power of doing so. I think, therefore, that one of the officers ought to authenticate the notice with his signature, in order that the meeting may be convened.

COLERIDGE, J. I am of the same opinion. If it had been intended to give the officers named a discretion, there would hardly have been so many officers mentioned. But if the signature was intended to be merely formal for the purpose of authenticating the requisition, then there was good reason for naming so many, namely, to secure at all times an officer's signature for that purpose.

ERLE, J. I considered this point when the case of *The Queen v. Barnatyne* was before me, and I thought the words of the section warranted my deciding that it was discretionary on the part of the officers to sign the notice, and there seemed to me good reason, with a view to the stability of these societies, that there should be such a provision, so that seven members only should not at any time bring the society's existence into jeopardy. I thought, therefore, and still think, that the sanction of one of the principal officers of the society was necessary to the convening of a general meeting; but as the other judges entertain a different opinion, the rule must be absolute.

Rule absolute.

Tetley v. Taylor.

TETLEY & Another v. TAYLOR.¹

November 21, 1851.

Bankrupt — Consolidation Act, 1849 — 12 & 13 Vict. c. 106, ss. 224, 228, 230 — Arrangement by Deed — Composition Deed — Distribution of Estate.

A composition deed, executed by six sevenths in number and value of the creditors of a trader, whose debts amount to 10*l.* and upwards, whereby, in consideration of a composition to be paid upon the full amount of their debts, they agreed to release the trader, is binding upon the rest of the creditors, (not parties to it,) as a deed of arrangement, under the 12 & 13 Vict. c. 106, s. 224.

A deed of arrangement may be within the clauses of that act respecting arrangement by deed, although it does not provide for the distribution of the whole estate of the trader.

Drew v. Collins, 20 Law J. Rep. (N. S.) Exch. 369; s. c. 4 Eng. Rep. 540, dissented from.

DEBT for goods sold and delivered, and on an account stated.

Second plea, as to 43*l.* 11*s.* 10*d.*, parcel of the moneys in the declaration mentioned, (after identifying the causes of action in the first and last counts so far as related to the said sum of 43*l.* 11*s.* 10*d.*,) that before and at the time of making the indenture hereinafter mentioned, the defendant was a trader, to wit, a draper, liable to become bankrupt under the bankrupt laws, and within the meaning of the statute hereinafter mentioned; and that before and at the said time of making the said indenture he was indebted to the parties of the third part to the said indenture, and to divers other persons, in divers sums, and was and would be unable to pay the same in full; that the defendant, before the time of making the said indenture, to wit, after the passing and coming into operation of the statute hereinafter mentioned, to wit, on, &c., suspended payment, and thereupon, by a certain indenture, made after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849, and after the 11th of October, 1849, to wit, on, &c., (profert,) and which said indenture was made between the defendant of the first part, J. V., G. J., and T. P., of the second part, and the several persons whose names and seals were thereunto subscribed and set as hereinafter mentioned, (being respectively creditors of the defendant or the authorized agents of such creditors,) of the third part, after reciting, among other things, that the defendant was justly and truly indebted unto his said several creditors (parties to the said indenture of the third part) in the several sums of money set opposite to their respective names, as in the said indenture written, and being unable to pay the same in full, he, the defendant, had proposed to pay unto each and every of such creditors a composition, after the rate of 7*s.* 6*d.* in the pound, upon and in full satisfaction of their respective debts, by three equal instalments of 2*s.* 6*d.* in the pound each, at four, eight, and twelve calendar months after the date of the said indenture, and to be secured by the covenant thereafter contained in that behalf, and also by the joint

¹ 21 Law J. Rep. (N. S.) Q. B. 2; 16 Jur. 59.

Tetley v. Taylor.

and several promissory notes of the said parties thereto of the first and second parts, or by bills of exchange in lieu thereof, bearing their signatures, and payable and indorsed to the said creditors respectively, to which arrangement and proposal the said creditors, parties thereto, had consented and agreed, it was witnessed, that in pursuance of the arrangement and agreement in the said indenture contained, and in consideration of the said composition of 7s. 6d. in the pound having been so secured to the said creditors respectively (parties of the third part) by promissory notes and bills of exchange as aforesaid, (the receipt of which said promissory notes or bills of exchange the said creditors respectively, parties of the third part, did thereby acknowledge, testified by their execution of the said indenture,) and in consideration of the covenant in the said indenture contained, for payment of the said promissory notes or bills of exchange, on the part of the said parties thereto of the second part to be observed and performed, they, the said creditors of the defendant, executing the said indenture by themselves or by their legal substitutes, did thereby, for themselves respectively and for their respective executors and administrators, partners and assigns, (but not the one of the said creditors for the other or others of them, or for the heirs, executors, or administrators of the other or others of them, but each of them for himself and his partner and partners only,) covenant, promise, and agree to and with the defendant, among other things, that they the said several last-mentioned creditors should and would accept the aforesaid composition or sum of 7s. 6d. in the pound, in full satisfaction and discharge of the said several debts and sums of money due and owing to them by the defendant, as specified in a certain schedule to the said indenture underwritten, and also that they the said last-mentioned creditors should and would at any time or times from and after full payment and satisfaction of the said composition or sum of 7s. 6d. in the pound, at the request, cost, and charges of the defendant, his executors, or administrators, make, do, and execute unto him, the defendant, his executors or administrators, any other act, deed, matter, or thing for the more effectually releasing him, the defendant, or his said executors or administrators, from the said debts and sums of money due and owing from the defendant to the same creditors respectively, as the said defendant, his executors, or administrators, or his or their counsel in the law, should lawfully and reasonably advise or devise and require. And also that the said last-mentioned creditors of the defendant should not nor would sue or prosecute him, the defendant, his heirs, executors, or administrators, either at law, or in equity, for the said several debts or sums of money so due and owing to them respectively, or any or either of them, or any part thereof, except for recovery of the amount of the said composition of 7s. 6d. in the pound, in case the same or any part thereof should remain unpaid when it or any instalment thereof should become due, and that in case the said last-mentioned creditors, any or either of them, their, any or either of their heirs, executors, or administrators, should commence or prosecute any action or suit at law or in equity against him, the defendant, his executors, or administrators, contrary to the

Tetley v. Taylor.

purport, true intent, and meaning of the said indenture, then and in such case it should be lawful for him, the defendant, or his executors or administrators, to plead the said indenture in bar of any such action or suit. And the defendants, the said J. V., G. J., and T. P., for themselves jointly and severally, and for their joint and several heirs, executors, and administrators, did and each of them did thereby covenant, promise, and agree with and to each of the said last-mentioned creditors that they the said defendants, the said G. V., G. J., and T. P., some or one of them, their, or some or one of their heirs, executors or administrators, should and would well and truly pay or cause to be paid the said promissory notes or bills of exchange for the said composition or sum of 7*s.* 6*d.* in the pound, as and when the same respectively should become due and payable.

And the defendant further says, that before the commencement of this suit, to wit, on, &c., to wit, at the time of the making of the said indenture, the same was sealed by the defendant, and divers, to wit, fifty, of the creditors of the defendant by themselves signed the said deed and subscribed their names and set their seals thereto, and divers, to wit, fifty, others of the said creditors by their authorized agents respectively, signed the said deed and subscribed their names and set their seals thereto; and that the said indenture was and is an arrangement by deed, and a deed of arrangement within the meaning of the provisions of the said act with respect to arrangements by deed, and that the said creditors by whom, and on behalf of whom the said deed was so signed and executed as aforesaid were more than six sevenths, to wit, nine tenths, in number and value of the creditors of the defendant, within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the said creditors, by whom and on behalf of whom the said deed was so signed, as aforesaid, thereby assented to the said deed, and to be bound thereby. And the defendant further says, that the plaintiffs were, at the time of making the said deed, creditors of the defendant in respect of the said causes of action in the introductory part of this plea mentioned, within the meaning of the provisions of the said act; and that at the said time of making the said deed the amount in the introductory part of this plea mentioned was a debt then due from the defendant to the plaintiffs within the meaning of the said deed, and that the said last-mentioned amount is not, nor is any part thereof, the amount or any part of the amount of the said composition, and did not accrue to the plaintiffs in respect of the said composition or any part thereof; and that after the said suspension of payment by the defendant as aforesaid, and after the said deed had been so signed and executed as aforesaid, to wit, &c., the plaintiffs had notice from the defendant of his the defendant's said suspension of payment, and of the said deed of arrangement, and were then requested by the de-

Tetley v. Taylor.

defendant to sign and execute the said deed, and the plaintiffs then might and could, if they would, have signed and executed the same as parties thereto of the third part; and that three calendar months from the time when the plaintiffs had such notice of the defendant's said suspension of payment, and of the said deed, expired before the commencement of the said suit, and that he, the defendant, and the said parties of the second part have, at all times since the making of the said deed, well and truly observed and performed in all respects the covenants in the said deed contained on their parts to be observed and performed; and that by reason of the premises and by force of the statute aforesaid, the said deed (the same having been at all times from the making and entering into the same, and being still in force) became and was and is as obligatory on the plaintiffs as if they had duly signed and executed the same; and by reason of the premises the defendant, before and at the time of the commencement of this suit, became and was released and discharged from the said causes of action in the introductory part of this plea mentioned. Verification.

The plaintiffs, after setting out the said indenture upon oyer, demurred specially to the second plea upon the ground (amongst others) that the indenture was not a deed of arrangement within the true intent and meaning of the provisions of the Bankrupt Law Consolidation Act, 1849. Joinder in demurrer.

The case was argued,¹ by

Willes, for the plaintiffs. — This deed is not a deed of arrangement within section 224 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106,² and therefore is not binding upon the plaintiffs, who are not parties to it. That section does not extend to composi-

¹ November 14, before Lord CAMPBELL, C. J., PATTESON, J., COLERIDGE, J. and WIGHTMAN, J.

² With respect to arrangements by deed, it is enacted, by section 224, "That every deed of memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum or arrangement as if they had duly signed the same."

Section 228 enacts, "That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy."

Section 230, with respect to composition after adjudication of bankruptcy, enacts, "That any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors (whereof, and of the purport whereof, twenty-one days' notice shall be given in the *London Gazette*), and if the bankrupt or his friends shall make an offer of composition, and nine tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall

Tetley v. Taylor.

tion deeds, by which the debtor is released upon payment of a certain proportion of his debt. As long as there are any assets to be distributed, and the creditors have received less than 20s. in the pound, so long must the estate of the debtor remain liable under any arrangement within that section. Section 228 shows that the meaning of section 224 must be confined to cases where the assets are to be "distributed in like manner as in bankruptcy." The whole of the clauses relating to arrangements by deed must be read together.

[COLERIDGE, J. The evident object is to facilitate arrangements between debtor and creditor.]

Although the terms of section 224 would include such a deed as the present, the following clauses show that its operation is confined to deeds of inspection or management which give to the creditors a benefit in the whole of the assets.

[LORD CAMPBELL, C. J. You say there must be a *cessio bonorum* in all cases, and that the assets must be distributed by inspectors as they are in bankruptcy.]

Section 230 expressly provides for deeds of composition where a bankruptcy has taken place, and the bankrupt has passed his last examination, but such a deed must be agreed to by a larger proportion than nine tenths of the creditors. However, this question has been expressly decided by the Court of Exchequer in *Drew v. Collins*, 20 Law J. Rep. (N. S.) Exch. 369; s. c. 4 Eng. Rep. 540. The only difference between that deed and the present is, that here there are sureties for the payment of the composition, but that does not affect the question.

Phipson, contra. The grounds of decision stated in *Drew v. Collins* cannot be supported by reference to the pleadings as set out in the report. It is said that the deed there in question gave the surplus, after paying the 6s. 8d. in the pound, to the insolvent, but there really is no part of the deed as stated in the plea which leads to such an inference.

[LORD CAMPBELL, C. J. The judgment seems to proceed upon the broad principle that section 224 applies only where there is to be a distribution of the whole estate according to the rules of bankruptcy.]

That view of the meaning of the section cannot be supported. The object was to enable a large proportion of the creditors to agree with a trader so as to avoid the exposure of a bankruptcy. The clause is remedial, and tends to prevent the loss consequent upon the distribution of small estates, and should therefore be construed liberally. It must be presumed that when so large a proportion as six sevenths in number and value of the creditors have agreed to accept a composition, there is little probability of a larger amount being forthcoming. In such a case it is very reasonable that all the creditors should be bound.

and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to."

Tetley v. Taylor.

[LORD CAMPBELL, C. J. The object is to prevent one obstinate creditor from standing out and preventing the rest from getting their debts paid as far as it is likely the assets will go.]

The present deed is obviously very beneficial, as six sevenths of the creditors are content to take the composition secured by the notes of the sureties. It must be contended, that every deed, however beneficial, which does not work exactly like a bankruptcy, is out of the protection of section 224. That section itself will not bear the construction placed upon it in *Drew v. Collins*. It no doubt includes deeds which provide for the distribution of the estate, but it does not follow that it includes no others. The terms of the clause negative such a construction. The meaning of the 228th section is only that where the estate is distributed it is to be distributed as in bankruptcy.

[COLERIDGE, J. The expression "joint and separate assets" in section 228 cannot apply except in cases of partnership.]

That shows that a distribution of the estate is not imperatively required in all cases. In *Stewart v. Collins*, 20 Law J. Rep. (N. S.) C. P. 79; s. c. 2 Eng. Rep. 322, no such objection as the present was raised. This is a deed of arrangement "touching the trader's liabilities and his release therefrom," and it falls therefore directly within the words of section 224. The argument drawn from the mention of deeds of composition after bankruptcy, in section 230, cannot assist the plaintiffs, as it does not show that such deeds may not be also within section 224.

Willes, in reply. In *Drew v. Collins*, the effect of the release was in effect to give the debtor the surplus after paying the composition, and therefore the general principle laid down by the court did there apply.

[LORD CAMPBELL, C. J. Taking the terms of section 224 by itself, such a deed as this would surely be included in it.]

No doubt it would, and so would a simple deed of release. But looking to the other clauses with respect to arrangements by deed, it will appear that a distribution of the estate must be provided for in all cases. The use of the word "composition" in section 240, coupled with its omission in section 224, leads to the strong inference that it was purposely omitted. It would be most unjust that any creditor should be bound to accept the mere personal liability of his debtor and sureties to pay a part of his debt in lieu of his whole debt. There is, therefore, less hardship in the view taken by the Court of Exchequer than in that suggested by the defendant.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. The question in this case is, whether a composition deed signed by six-sevenths in number and value of the creditors of a trader, is a bar to an action by a creditor who has not signed it, if, upon payment of the composition, the trader is to continue in possession of his property and his creditors are to release him

Tetley v. Taylor.

from his debts. The plaintiffs' counsel very properly admits that such a deed does come within the language of the 224th section of the 12 & 13 Vict. c. 106, and that he is bound to show that a condition is subsequently mentioned in the statute which excludes such a deed from its operation. The 224th section, without expressly naming a composition deed or any other species of the class of deeds to which it belongs, enacts, "that every deed of arrangement entered into between a trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned,) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed of arrangement as if they had duly signed the same."

It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors, or that it excludes a deed which allows them to remain in possession of them on payment of such a composition as is satisfactory to six sevenths of his creditors, and on performance of such other stipulations as they consider more for their advantage than forcing him into bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The section cautiously and anxiously guards against the supposition that the deed to be protected must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects, and he may be enabled to pay this composition from the assistance of friends and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were a made a bankrupt.

A great power is certainly given to the six-sevenths in number and value of the creditors; but they can only place the remaining seventh in the same situation in which they have placed themselves; and it surely would not be imputing any absurdity to the legislature, the words employed by them naturally bearing such a meaning, if we suppose that they considered the risk of the six-sevenths in number and value of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies, was so small as not to deserve consideration, or, at least to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur until by a clandestine bargain their claims are fully satisfied. Our books of reports abound with cases which have arisen out of such fraudulent transac-

tions; and an attempt to put an end to them might be considered not unwise or unbecoming.

It is likewise to be observed that a composition, with the consent of a certain portion of the creditors, is clearly sanctioned under section 230, after a *fiat* and the bankrupt has passed his last examination, and it would seem strange if an arrangement by composition could only be effected through the expensive process of a *fiat* and adjudication of bankruptcy, and all the steps required to be taken down to the last examination of the bankrupt. The consent of a larger proportion of the creditors (nine-tenths) is required if the composition is not offered till this advanced stage, when the estate is probably materially injured; but the same power may not improbably be given by general words to six-sevenths of the creditors in an earlier stage, when the composition is likely to be larger.

We must look, however, to the enactment, by which it is contended that a condition inconsistent with a composition deed is imposed upon all deeds to be protected by sect. 224. The plaintiffs' counsel relies entirely upon the words in sect. 228: "That the creditors of every such trader shall have the same right respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy." The first part of this enactment, as to the *rights* of creditors, only points out the mode in which the amount of the debts claimed by them is to be ascertained, and applies as well to a composition deed as a deed under which all the effects of the trader are to be sold and distributed among his creditors. The remaining words, "and joint and separate assets shall be distributed in like manner as in bankruptcy," do not apply to a composition deed; but are they enough to show the intention of the legislature that every deed to which they do not apply is to be excluded from the protection given by the statute to such arrangements? They do not apply unless the trader has been in partnership, and has joint and separate assets, so that a sole trader and his creditors cannot have the benefit of a deed of arrangement against the will of any rapacious or fraudulent creditor, even if the business of the trader is entirely stopped, and all his effects are to be sold for distribution among all his creditors. But may not the meaning be, that where there are joint and separate assets to be distributed, they "shall be distributed in like manner as in bankruptcy"? This is no general enactment that in every case the assets of the trader must be distributed according to the bankrupt law; and it seems to say no more than that where the trader has been in partnership, and has separate as well as joint property to be distributed, the separate creditors are to have the benefit of the separate assets, and the joint creditors of the joint assets, but does not impose a necessity for having any such distribution if the creditors are contented rather to take a certain proportion of their debts guaranteed by sufficient sureties.

The 224th section clearly comprehending composition deeds, the subsequent proviso to exclude them ought to be clear; but the words relied upon are at most equivocal; and sufficient effect may be given to them without supposing that they are meant to narrow the opera-

Levinson v. Syer.

tion of the act to cases where, in mercantile language, the trader is to be "broken up," leaving the frauds and mischiefs long experienced in arrangements by composition deed untouched.

We have been (not unduly) pressed with the authority of *Drew v. Collins*. To that authority we have paid the most sincere respect; but after a very careful examination, we are not able to assent to the reasoning on which it rests. As it is only the decision of a court of co-ordinate jurisdiction, we do not consider ourselves bound by it; and we have the less reluctance to decide according to our own opinion as, the question being upon the record, it may be carried to the Exchequer Chamber and the House of Lords. We therefore feel that on this demurrer we are bound to give judgment for the defendant.

Judgment for the defendant.

LEVINSON v. SYER.¹

November 11, 1851.

*Warrant of Attorney — Attestation by Attorney named in the Warrant —
Issuing Execution for Plaintiff.*

A warrant of attorney, prepared by the defendant, was addressed to H., an attorney, by name. The plaintiff introduced H. to the defendant, who adopted him as his attorney to attest the execution of the warrant of attorney, and H. accordingly attested it. H. afterwards, at the request of the plaintiff, signed judgment and issued execution on the warrant as attorney for the plaintiff.

The court refused to set aside the warrant on the objection that the attestation by H. was insufficient.

This was a motion to set aside the judgment signed and execution issued on a warrant of attorney, and to discharge the defendant out of custody, and to have the warrant of attorney delivered up to be cancelled.

The defendant had been arrested on the 6th of November under a *ca. sa.* issued on a judgment, signed on the 31st of October last, on a warrant of attorney, executed on the 23d of August last. The affidavit of the defendant stated that the warrant of attorney had been given for goods supplied, and that it had been prepared at his request by a law-stationer according to terms previously agreed upon between the attorney and the defendant. The affidavit then added: "And deponent further saith that on the said 23d of August he accompanied the said plaintiff by his desire and one Edgar W. Drew, to the office of Mr. Seneca Hughes, the attorney for the said plaintiff in this action, at 15 Bedford street, Covent Garden, in the county of Middlesex, (in which said house the plaintiff also then resided,) for the purpose of the said Mr. Hughes witnessing the execution of the said warrant of

¹ 21 Law J. Rep. (N. S.) Q. B. 16.

Levinson v. Syer.

attorney by this deponent, and that on the said 23d of August last he signed the said warrant of attorney at the said office, and in the presence of the said Mr. Hughes, who attested the execution thereof, and acted as the attorney for this deponent therein. And deponent further saith that there was no attorney present at the said time when deponent so signed the said warrant of attorney save and except the said Mr. Hughes, who, previously to this deponent so signing the said warrant of attorney, requested this deponent to authorize him, the said Mr. Hughes, in writing, to act for him, this deponent, as his attorney, in the signing and executing the said warrant of attorney, and which authority he, this deponent, accordingly wrote and signed," &c.

Mr. Drew's affidavit stated, that the plaintiff introduced the defendant to Mr. Hughes, and said to the latter that he was to act as the defendant's solicitor in the proceeding.

The warrant of attorney was addressed "To T. Moseley, Seneca Hughes, and H. C. Russell, gentlemen, attorneys for Her Majesty's Court of Queen's Bench at Westminster, jointly and severally, or to any other attorney of the same court."

The attestation clause ran thus:—"Signed, sealed, and delivered by the said J. J. Syer, in the presence of me, attorney for and on behalf of the said J. J. Syer, expressly named by him and attending at his request, and whom I informed of the nature and effect of the above warrant of attorney before the same was executed, and I subscribe as such attorney. SENECA HUGHES, attorney-at-law,

15 Bedford street, Covent Garden."

The judgment was signed on the warrant of attorney, and execution issued by Mr. Hughes, as attorney for the plaintiff.

Hawkins, in support of the motion. The warrant of attorney cannot be supported. It is attested by Hughes, who is attorney for the plaintiff. The plaintiff's attorney cannot act as attorney for the defendant in the attestation of a warrant of attorney. *Pryor v. Swaine*, 2 Dowl. & L. P. C. 37; s. c. 13 Law J. Rep. (N. S.) Q. B. 214; *Sanderson v. Westley*, 6 Mee. & W. 98; s. c. 9 Law J. Rep. (N. S.) Exch. 204.

[ERLE, J. How does it appear that Hughes was attorney for the plaintiff at the time?]

The plaintiff lived in Hughes's house, and introduced the defendant to Hughes, and told Hughes what he was to do. The warrant is addressed to Hughes. Hughes signed judgment on it, and issued execution as attorney for the plaintiff. There is, at least, enough to call upon the plaintiff to show, if he can, that Hughes was not his attorney. Secondly, as the warrant is addressed to Moseley, Hughes, and Russell, it is submitted that they are incompetent to act as attesting witnesses for the defendant.

[ERLE, J. The warrant is equally addressed to every other attorney of the Court of Queen's Bench. If this objection could prevail, no attorney of the Queen's Bench could act as attesting witness; and so practically there could be no warrant of attorney duly attested.]

A distinction may well be taken between those attorneys who are

CORSAR v. REED.

specially named and those who could be included only under the general words. Probably the proper mode of drawing the warrant would be, to add the words, "except the attorney who shall attest the same."

ERLE, J. I am of opinion that no sufficient grounds have been laid for setting aside this warrant of attorney. It is a security given for good consideration, and was prepared by the defendant himself, who is now endeavoring to take advantage of a matter that has no effect on his substantial rights. There is no statement in the affidavit that Hughes ever had been the attorney of the plaintiff before the execution of the warrant of attorney, or was his attorney at that time. The fact of the plaintiff living in the same house with Hughes does not tend to show that he was his attorney, nor does the circumstance of Hughes issuing execution afterwards, at the request of the plaintiff, raise a necessary presumption that he was the plaintiff's attorney when he attested the warrant. It is said that the plaintiff introduced the defendant to Hughes; but a great number of cases establish the proposition, that although the plaintiff introduces the attorney, yet if the defendant, with full knowledge of his rights, adopts the attorney so introduced and takes him as his attorney, the instrument attested by such attorney is perfectly valid. Here the defendant signs a retainer to Hughes, and adopts him, and takes him as his attorney, apparently with a full knowledge of his rights; and I see no clear ground for assuming that Hughes was then attorney for the plaintiff.

It was further objected that, as the warrant of attorney was addressed to Hughes, the latter was not competent to attest the document as attorney for the defendant; but I see no principle, and no authorities have been cited to lead me to hold that an attorney who is entitled to enter up judgment on the warrant is therefore incapable of acting as attorney for the defendant to attest the execution.

Rule refused.

CORSAR & others v. REED.¹

November 21, 1851.

Error — Bill of Exceptions — Nonsuit — Plaintiff's Right to appear.

If, upon the trial of a cause, the judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the judge to direct the jury in point of law in his favor, and upon the judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favor, the plaintiff may tender a bill of exceptions, and bring a writ of error.

[*Strother v. Hutchinson*, 4 Bing. n. c. 83, explained. Eds.]

ERROR upon a bill of exceptions to a judgment of the Court of

¹ 21 Law J. Rep. (N. S.) Q. B. 18; 16 Jur. 57.

Cossar v. Read.

Record of the borough of Kingston-upon-Hull. The record, as returned in obedience to the writ of error, set out a declaration in the borough court for goods sold and delivered by the plaintiffs to the defendant within the jurisdiction of the said court, and upon an account stated within the jurisdiction aforesaid between them. The defendant pleaded, (amongst other pleas,) "never indebted," upon which issue was joined, and after stating the award of the jury process, the record proceeded:—"Afterwards, &c., came as well the said plaintiffs as the within-named defendant, &c., and the jurors of the jury whereof mention is made being summoned, also came, who to speak the truth of the matters within contained being chosen, tried and sworn, after evidence being given to them, thereupon withdrew from the box here to consider of the verdict to be by them given of and upon the premises, and after they had considered thereof and agreed amongst themselves, they returned to the box to give their verdict in that behalf. Whereupon the plaintiffs, being solemnly called, came not, nor do they further prosecute their writ against the defendant. Therefore it is considered that the said plaintiffs take nothing by their said writ," &c.

The bill of exceptions, after stating that the issues came on to be tried at the said borough court, set out certain facts which were given in evidence by the counsel for the plaintiffs in support of the first issue raised to the first count.¹ "Upon the aforesaid proof, the counsel for the said defendant insisted that the above evidence proved a delivery of the said goods by the plaintiffs to the defendant at Arbroath in Scotland, and not any delivery of them at Kingston-upon-Hull within the jurisdiction aforesaid, and that, therefore, the plaintiffs were not entitled to recover upon the said first count of the declaration. The plaintiffs' counsel, on the other hand, insisted that the said evidence proved such a delivery of the said goods to the defendant by the plaintiffs within the said jurisdiction, and that the action was, therefore, maintainable as far as respected the said first count. The said judge of the said court, however, declared it to be his opinion, and held and affirmed, that the evidence so given as aforesaid proved a delivery of the said goods to the defendant at Arbroath in Scotland and not at Hull, or within the jurisdiction of the said court." And to maintain the issue firstly above joined, so far as respects the said second count, the plaintiffs' counsel gave in evidence other facts (setting them out,) "but the said judge then declared it to be his opinion, and held and affirmed, that there was no evidence of an account stated within the jurisdiction so as to maintain the said count of the declaration. And the said judge of the court aforesaid having so declared his opinion and decision in favor of the said defendant on the issue aforesaid, with respect to both the said counts, nonsuited the plaintiffs. Whereupon the counsel for the plaintiffs, conceiving that such opinions and decisions of the said judge were erroneous and bad

¹ The evidence, as well as all argument upon its effect, is omitted in the report, as the court gave no opinion upon the merits of the case.

CORSAR v. REED.

in law, made his exceptions to the said opinions, decisions, and judgments of the said judge," &c.

Joinder in error.

Crompton, for the plaintiff in error.¹ *Strother v. Hutchinson*, 4 Bing. N. C. 83; s. c. 7 Law J. Rep. (N. S.) C. P. 1, is a distinct authority that a bill of exceptions will lie upon a nonsuit.

[LORD CAMPBELL, C. J. There the sheriff acted against law in nonsuited a plaintiff who appeared.]

So here it is stated in the bill of exceptions that the recorder nonsuited the plaintiff, who thereupon tendered a bill of exceptions. It is perfectly clear, therefore, that the plaintiff objected to being nonsuited, and so the two cases are directly parallel.

Mellish, contra. No writ of error will lie in this case. A party may when being called appear and require the judge to direct the jury, and then he may tender a bill of exceptions to that direction; but if he does not appear and is nonsuited, he cannot afterwards be heard to except to the ruling of the judge in point of law. The sole ground of the decision in *Strother v. Hutchinson* is, that the judge nonsuited the plaintiff against his will, and refused to leave the case to the jury; there is no doubt that the sheriff's decision there was perfectly correct in point of law.

[LORD CAMPBELL, C. J. But it does seem to lay it down broadly that a judge's direction of a nonsuit is reviewable by bill of exceptions.]

The judgment of Bosanquet, J., shows that the court proceeded on the ground that the judge had misconducted himself in directing the nonsuit against the will of the plaintiff. In truth, the plaintiff there was never legally nonsuited, and there is no doubt that if a wrong judgment is entered, on a nonsuit, a writ of error will lie. But there is no single case to be found where a plaintiff, after being duly nonsuited, has ever been allowed to tender a bill of exceptions.

[LORD CAMPBELL, C. J. The statement on this record that the plaintiff was nonsuited, and thereupon tendered a bill of exceptions, is absurd. He was out of court by the nonsuit.]

It is for that reason that a plaintiff after a nonsuit cannot move for judgment *non obstante veredicto*. In *Evans v. Swete*, 2 Bing. 326; s. c. 3 Law J. Rep. C. P. 21, Best, C. J., says, it is difficult to conceive that error can lie after a nonsuit, except for some mistake in entering up the judgment. *Kempland v. Macauley*, 4 Term Rep. 436. *Minchin v. Clement*, 1 B. & Ald. 252, shows that Lord Ellenborough's opinion was to the same effect.

[LORD CAMPBELL, C. J. The established practice is that a plaintiff may always appear and require the case to go to the jury. I remember having done so on the Oxford circuit, and succeeded in getting the verdict.]

There is nothing on this record to show that the judge was ever

¹ Before LORD CAMPBELL, C. J., PATTESON, J., and COLERIDGE, J.

asked to direct the jury. The expression that "the judge nonsuited the plaintiffs" can only mean that he expressed an opinion that the plaintiffs should be nonsuited, and that the plaintiffs acquiesced in that opinion. If this attempt were to prevail, the case might be carried up to the House of Lords, and if the judgment of nonsuit were there affirmed the plaintiffs would be able to bring a fresh action the next day, whereas *interest reipublicæ ut sit finis litium*.

Crompton, in reply. The statute of Westminster says nothing about a jury or a verdict; a bill of exceptions is given for any miscarriage of a judge in point of law.

[LORD CAMPBELL, C. J. The practice for which you contend would be very inconvenient if allowed.]

It is a mere question of degree, whether a judge nonsuits a plaintiff *in invitum*, or a plaintiff acquiesces in the decision of the judge, and is nonsuited through ignorance of the law.

[PATTESON, J. This record is inconsistent. A plaintiff cannot tender a bill of exceptions after he is nonsuited.]

The same inconsistency existed in *Strother v. Hutchinson*. But it is in truth merely formal, as there are no doubt some cases where a bill of exceptions may be tendered after a nonsuit. The objection is clearly answered in that case.

[LORD CAMPBELL, C. J. Can you after a nonsuit bring a writ of error for any thing which took place before the nonsuit?]

In *Strother v. Hutchinson*, Tindal, C. J. says, it lies for improperly allowing or refusing a challenge of the jury.

Cur. adv. vult.

The judgment of the court was now delivered by

LORD CAMPBELL, C. J. We are of opinion that if upon the trial of a cause the judge directs a nonsuit and the plaintiff does not appear when called, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course would have been for the plaintiff when called, to have appeared and required the judge to direct the jury in point of law in his favor. Upon the judge refusing to do so, or refusing to permit him to appear, he might have tendered a bill of exceptions, and brought a writ of error. He had a clear right, if he so thought fit, to have the issues joined submitted to the jury, and to tender a bill of exceptions upon the judge's direction in point of law; and if the judge refused to permit him to appear and insisted on nonsuiting him against his will, this would be a miscarriage, for which a bill of exceptions would lie. But if acquiescing in the nonsuit he does not appear, and no direction in point of law is given to the jury and no verdict is found, we conceive that the supposition of a bill of exceptions is an absurdity.

When the plaintiff has made default and abandoned his suit, he is not in court, and it is impossible that he should tender a bill of exceptions. His only remedy is an application to the court from which the

Cromar v. Reed.

record comes to set aside the nonsuit and grant a new trial. In the vast majority of cases ample justice is thus done to the plaintiff; but if he distrusts the court from which the record comes, and wishes to put the question of law upon the record, his course is to appear and to insist on the judge directing the jury, and on the jury finding a verdict. That he is entitled to do so is clearly established by *Minchin v. Clement*, and various other authorities collected in 1 Saund. 195 *d*, n. A writ of error may be brought where there has been judgment upon a nonsuit, but this is for some error subsequent to the nonsuit, which can so rarely occur that such a writ of error is considered as almost necessarily brought for delay. In *Evans v. Sweet*, Best, C. J., says, "It is difficult indeed to conceive how error can lie after a nonsuit, except for some mistake in entering up the judgment: error on the original record cannot be complained of when the plaintiff has abandoned all his proceedings."

Mr. Crompton placed all his reliance on *Strother v. Hutchinson*, an instance (and the only one to be found in the books) of a bill of exceptions on a nonsuit. But when that case is examined, it will be found to be no authority for him, as the language of the judges must be construed with reference to the proceedings before them. There the plaintiff, instead of acquiescing in the nonsuit, appeared when called, and the very exception taken was that the judge still insisted on nonsuiting him, instead of leaving the issue to the jury with a direction in point of law how it was to be found. The bill of exceptions alleged, that "though the said plaintiff did then and there by his said attorney insist upon the cause being left to the jury, and did offer to abide their determination, and did appear on his being called, and did refuse to consent to a nonsuit, yet the said sheriff did then and there order the said plaintiff to be called, and did then and there declare that the said plaintiff was nonsuited, and the jury thereupon did not give a verdict. Whereupon the said plaintiff by his said attorney did then and there except to the opinion of the said sheriff, and did insist on the illegality of nonsuiting him, the said plaintiff, without his consent and contrary to his wish." Tindall, C. J., says, "It is objected that the judge's directing a nonsuit cannot be the subject of a bill of exceptions; I think, however, that such a direction falls within the principle on which that remedy has been provided for errors in judgment at the trial." But this must be understood of directing a nonsuit where the plaintiff has appeared, and refused to be nonsuited. Being still in court and desirous to prosecute his suit, there is no difficulty in supposing that he tenders a bill of exceptions. In the present case there is the following statement in the record of the judgment. "Whereupon the plaintiffs, being solemnly called, came not; nor do they further prosecute their suit against the defendant. Therefore it is considered that the plaintiffs take nothing by their writ," and the bill of exceptions appended to the judgment-roll shows that the plaintiffs acquiesced in the nonsuit, and never offered to appear, "the said judge then declared it to be his opinion, and held and affirmed, that there was no evidence of an account stated within the said jurisdiction; and the said judge having so declared

Regina v. The Master, &c. of God's Gift in Dulwich.

his opinion and decision in favor of the said defendant, nonsuited the plaintiffs; whereupon the counsel for the plaintiffs made his exceptions," &c. No opposition is offered to the nonsuit, and no bill of exceptions is alleged to have been tendered till the plaintiffs when called had declined to come forth and were in court no longer. *Strother v. Hutchinson*, therefore, is not an authority in point.

We have only further to observe, that extreme inconvenience would follow if the practice were introduced of tendering a bill of exceptions upon the judge's direction in point of law, without a finding of the issue by the jury; for the record might thus be carried into the House of Lords, and after a decision against the plaintiff by the court of last resort a nonsuit merely would be confirmed, and he would be at liberty to commence a fresh action for the same cause. Upon the whole, we are of opinion that no error is assigned in the present case of which we can take notice, and that the defendant in error is entitled to our judgment. *Judgment for the defendant in error.*¹

REGINA V. THE MASTER, FELLOWS, AND ASSISTANTS OF THE COLLEGE OF GOD'S GIFT IN DULWICH.²

November 19, 1851.

Corporation — College — Statutes, Construction of — Right of voting for Corporate Officer — Charter — Delegation of Powers by Crown — Usage.

King James I. by a charter in 1619, granted to E. A. license to found a college, which should consist of one master, one warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, to be maintained, &c. according to such ordinances, &c. as should be made by the said E. A., with power to the said E. A. to make ordinances, &c. for the maintenance, rule, government, &c. of the said master, warden, &c., which should be a body corporate. E. A. by deeds in 1619 created the college, to consist of the several persons named in the charter, and by an indenture dated in 1620, he endowed the college with lands in three parishes. By an instrument made in 1626, E. A., by virtue of the power given to him by the charter, made certain ordinances, &c. for the government of the said college. These ordinances provided that the churchwardens of the three parishes where the college lands were situate should be assistants to the master, warden, and fellows of the said college in the governing thereof, and gave them power to elect the poor brethren, sisters, or scholars from the parishes to which they respectively belonged. They also provided that if the place of warden should be void, "the master, assistants, and fellows" should go

¹ Quashing the writ of error appears to be the proper course of proceeding where the writ does not lie, or has improperly issued. See *Tolson v. Kaye*, 7 Sc. N. R. 222; *King v. Simmonds*, 7 Q. B. Rep. 289; s. c. 14 Law J. Rep. (N. S.) Q. B. 248; and *Thorpe v. Plowden*, 2 Exch. Rep. 387; s. c. 17 Law J. Rep. (N. S.) Exch. 235.

² 21 Law J. Rep. (N. S.) Q. B. 36.

In Maine it has been held under a statute of that state, which allows the party "aggrieved by any opinion, direction, or judgment" of the court, the right to file exceptions thereto, that a judgment directing a nonsuit is within the statute, and

exceptions lie thereto. *Feyler v. Feyler*, 2 Greenleaf, 310, (1823.) But it has recently been decided in Illinois, that if a party voluntarily submits to a nonsuit, he cannot allege exceptions. *People v. Brown*, 3 Gilman, 87, (1846.)

Regina v. The Master, &c. of God's Gift in Dulwich.

into chapel and "proceed to the election of a new warden," and that, after the senior fellow had read the statutes relating to the persons to be elected, "*the electors should make the said election indifferently,*" &c. If both the places of master and warden should be void at one time, notice was to be given by the senior fellow to the assistants to repair to the college within three days "*to join with the fellows in the election of a new master, which should be in all points as he formerly described in the election of a warden.*" The assistants had always, from the foundation of the college, been accustomed to vote at the elections of wardens:—

Held, first, that by these ordinances, coupled with the invariable usage, the assistants had a voice in the election of warden; and, secondly, that E. A., although he could not alter the constitution of the college, had power to give the assistants, who were not members of the corporation, a right of voting for a corporate officer; and, thirdly, that the lapse of time after the foundation of the college did not take away his right to make such an ordinance.

MANDAMUS to admit one Richard William Allen to the office of warden of the said college. The writ recited letters patent of the 17 James 1, (1619,) whereby that king granted a license to Edward Alleyne of Dulwich, to make and found one college in Dulwich aforesaid, which should endure and remain forever, and should consist of one master, one warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars to be maintained, sustained, educated, &c. according to such ordinances, statutes, and foundation as should be made by the said E. Alleyne in his lifetime, or any other person or persons to be specially nominated by him after his death. And that by the said letters patent power was also given to the said E. Alleyne to ordain and make ordinances, rules, constitutions, and statutes for the more better and orderly maintenance, &c. and rule of the said master, warden, four fellows, six brethren, six poor sisters, and twelve poor scholars of the said college when and as often as need should require; that the college so to be created should be called the college of "God's Gift;" and that the said master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, and their successors, when the same college should be created, should be a body corporate. And that the said King James I. did by the said letters patent also grant and give license and authority to the said E. Alleyne, &c. from time to time, and as often as need should require, to make and ordain statutes, ordinances, &c. for the good and better maintenance, sustenance, relief, education, government, and ordering, as well of the said college so to be created as aforesaid, as of the said master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, and their successors forever; and that the said statutes, ordinances, &c. so by him to be made should forever and in all succeeding times stand, be, and remain inviolable and in full force and strength in law to all intents and purposes, the same being not repugnant to the royal prerogative, nor contrary to the laws and statutes of England, nor any the ecclesiastical laws, canons, or constitutions of the Church of England which then should be in force.

The writ then stated that the said E. Alleyne, by a deed of the 13th of September, 17 James 1, and by virtue and force of the said letters patent, and by the power and authority thereby to him granted, did make, found, erect, create, and establish one college in Dulwich aforesaid, which should endure and remain forever, and should consist of one master, one warden, four fellows, six poor brethren, six poor

Regina v. The Master, &c. of God's Gift in Dulwich.

sisters, and twelve poor scholars, and did according to the liberty and power given him by the said letters patent, make, found, erect, and establish certain persons named in the said deed to be the first master, the first warden, the first four fellows, the first six poor brethren, the first six poor sisters, and the first twelve poor scholars respectively of the said college, and did give and grant to the same the offices and places aforesaid, to have and to hold the same to them and their successors in the same offices and places in perpetual succession forever, according to such statutes, ordinances, &c. as should thereafter be made by him, the said E. Alleyne. And that the said E. Alleyne did further by virtue and force of the said letters patent make, found, &c. and establish that the said college should forever be called and named "The College of God's Gift" in Dulwich, in the county of Surrey, and that the said master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars of the said college and their successors, should be in deed and name one body corporate.

The writ then stated that by an indenture, dated the 24th of April, 1620, E. Alleyne endowed the said college with certain lands in the parishes of St. Botolph, Bishopsgate, and St. Giles without Cripplegate, and that the said E. Alleyne by a certain instrument in writing signed by him, and bearing date the 29th of September, 1626, for the better maintenance, relief, sustenance, education, government, and ordering as well of the said college as of the said master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, by virtue and force of the said letters patent, and by the power and authority thereby to him given, did make certain ordinances, &c., and statutes [which the writ set out¹.] The writ then stated that

¹ The following were the material clauses of the statutes:—

1. *Imprimis.* I ordaine and establishe for ever, that there shall be a master, warden, fower fellows, sixe poore brethren, sixe poore sisters, and twelve poore scholars in and belonging to the college.

2. Item, for the better furtherance of the honor and service of Almighty God, and for the good and welfare of the said college, I ordaine and for ever establish for all succeeding times to come, that there shall be continually sixe chaunters for musique and singing in the chappel of the said college, and shall be called and esteemed as junior fellows, every one of them to have his voice according to the statutes as the fower senior fellows have; sixe assistants touching the ordering of the said college, and the rents, revenues, and profits thereof, and thirty members; the said chaunters, assistants, and members to be employed and taken to such uses, intents, and purposes, as hereafter in these my orders and statutes I shall further direct and appoint.

7. Item, that every one of the poore schollers shalbe at the time of their severall election and admission between the age of sixe or eight years or thereabouts, and to remain as schollars in the said college noe longer but untill they be eighteen years of age at the most, and then at the charge of the college to be put forth either for schollars or trades, as their capacity will fit; all of them at the tyme of their said admission to be orphans without father and mother, or at the least such as their parents receive the weekly alms of the parish where they live, and for want of such, any other poore children of the said parishes such as the assistants of the said parishes shall think in most need.

8. Item, that two churchwardens of the parish of St. Buttolphes without Bishopsgate, London, and two churchwardens of St. Saviour's in Southwarke, in the countie of Surrey, and two churchwardens of that part of the parish of St. Giles without Cripple-gate, London, which is in the countie of Middlesex, for the time being for ever,

Regina v. The Master, &c. of God's Gift in Dulwich.

the said ordinances, &c., and statutes had always from the time of the making of the same respectively hitherto remained and continued,

shall be assistants to the master, warden, and fellows of the said college in the governing thereof.

9. Item, that the sixe poore brethren and sixe poore sisters and twelve poore schollars shall be for ever chosen of the parishes herein specified in manner and form following, that is to say, two of the poore brethren and one of the poore sisters and three of the poore schollars out of the parish of St. Buttolpha, &c., two other of the poore brethren and one of the poore sisters and three of the poore schollars, out of the parish of St. Saviour's in Southwarke, one of the poore brethren and two of the poore sisters and three of the poore schollars out of that part of the said parish of St. Giles without Creplegate, &c., one other of the poore brethren, two of the poore sisters, and three of the poore schollars out of the parish of Camerwell in the county of Surrey.

10. Item, that the churchwardens and vestrie of the parishes of St. Buttolphes, &c., of St. Saviour's, &c., and of that part of the parishes of St. Giles without Creplegate, &c., shall severally in their parishes make choice of ten poore persons, (that is to saie,) five poore men and five poore women in each of their parishes to be members of the said college and to be admitted by them into my almshouses at London, that from thence they may be admitted into the college as places shall fall void. Provided that such as they admit and choose be (as neere as may be) single persons, &c., and if any of them after their admittance marry or become single and marry againe, that then every of the said members so doing shall by the assistants of that parishes where the same shall happen be thence expelled, and a new member chosen in his or her place that is expelled.

11. Item, that nyne of the poore brethren and sisters shall be elected out of those thirty members as places shall be void, that is, to those that are to be elected out of St. Buttolph's, St. Saviour's, and St. Giles, in manner following, that is, the assistants of that parish, or of that part of the parish from whence the partie deceased or departed had been taken before shall, upon notice given them by the master or warden of the said college of the place then void, send such two of those members as the master or warden shall nominate, which said two persons shall draw lots for the place, &c.

12. Item, that the manner of the drawings of the said lots shall be thus, that is to say, two equal small rowles of paper to be indifferently made and rolled up, in one of which rolls the wordes "Godd's guift" are to be written, and the other rowle is to be left blank, and so put into a boxe, which boxe shall be thrice shaken up and downe, and the eldest person of those two who are elected to drawe the first lot, and the younger person the second, and which of them draweth the lott wherein the words "God's gift" are written, shall be forthwith admitted into the void place or office in the said college, as the case shall require, &c.

13. Item, that when the place of the master shall be void, then the warden shall take upon him to be master without delay, &c., and shall be admitted thereunto by the fellows, or the most part of them then recidinge in the college, and shall take the oath hereafter expressed to be ministered unto him by the senior fellow then present, in the chappell of the said college in the presence of the corporation then present, &c.

14. Item, that the master the next daie after his admission shall in the chappell after morning prayer, there appoint the Monday fortnight following for the election of the warden, and shall also send three several notes to all the assistants for to give notice thereof in their several parishes churches the next saboth day, expressing the qualite and condition of the person elective.

15. Item, that upon the daie of the election of the warden, the master, the assistants and fellows after all or the moste parte of them be assembled, shall decently and orderly goe into the chappell and there after service and sermon made by one of the fellows, proceed to the election of a new warden; after that the senior fellow then present shall publicquely and audibly read such and so many of the before-recited ordinances as do expresse of what condition and qualitie the person elected ought to be, and after that, the elector shall make the said election indifferently without partiality, favour, or respect of persons.

16. Item, that if above the number of two shall stand to be elected wardens equal in

Regina v. The Master, &c. of God's Gift in Dulwich.

and still remained and continued unrescinded and unrevoked, and in full force and effect. And that there were not, nor have there been

blood and condition, that then they shall passe by voices of the electors then present, and that they two that shall have most voices to draw lotts for the place in such manner and form as is formerly expressed.

20. Item, that if both the places of master and warden shall happen to be void at one tyme, (which God forbid,) that the senior fellow then present shall, within fower-and-twentie hours, give notice thereof to the assistants to make speedy repair to the college within three days after, to ioyn with the fellowes in the election of a new master, which shall be in all points as is formerly described in the election of a warden, the master being admitted then presently, the next daie to appoint a time for the election of a warden as is above specified, and at every such election, the dynner for the whole college shall be at the said master and warden's equal charge.

23. Item, that when any of the poore schollars' places, that is to say, any of the nyne that are to be chosen out of the parish of St. Buttolph's, &c., St. Saviour's, &c., and that part of the parish of St. Giles without Creplegate, &c. shall happen to be void, then the master and warden shall give notice thereof to the two churchwardens (the assistants of that parishe, or of that part of the parishe from whence the poore schollar departed or deceased was first receaved into the college,) and they to cause three or fower of the poore children of their parishe to be sent to the college the Sunday se'nnight next following by nyne of the clock in the forenoon, that the master or warden of the said college may choose two to draw the said lotts for the vacant place, &c.

24. Item, that the master, warden, and fellowes shall forever have the sole denomination and election of the poore brethen and poore sisters and poore schollars that are to be elected out of the parish of Camerwell, to elect whom they shall think fitt, without limitation of age, provided always the persons elective (men and women) be single and needy, and especially if they inhabit in the lordshippes of Dulwich where the college standeth if yt may be.

Master and Warden's Oath.

25. I, A. B., admitted to the office of master, [or warden] of the College of God's Gift in the county of Surrey am a single person, unmarried, uncontracted, and so long as I shall execute the said office will, by God's assistance, so continue. I shall never fraudulently, maliciously, or wittingly for my part go about to alter or change the foundation of the said college, or any part thereof, or any ordinance or statute ordayned or made for the government thereof, but to the best and uttermost of my power shall faithfully keep and observe the same, &c. The warden to take the same oath at admittance, *mutatis mutandis*.

The Oath of the Assistants.

28. You, A. B. churchwarden of the parish, &c. who are now admitted to be one of the assistants of this College of God's Gift in Dulwich in the countie of Surrey, doe sweare that you for your parte shall not willingly or wittingly give consent at any time hereafter to the breaking or alteracon of the foundacon of this college or of any ordinance or statute made concerning the same or the government thereof, but so well as you may see them trulie kept and performed, &c.

The Office of the Assistants.

41. Item, that the assistants shall twice everye yeare repeare to the college to hear and see the audit and view the accompts of the warden and others, that is, on the fourth day of March and the fourth day of September, but if any of those daies be Sunday, then the next day after, and also be present at the college when the mr. and warden shall be elected and sworne.

Publique Audit and Private Sitting Dayes.

93. I ordaine and forever establish there shall bee too general auditt dayes and public meetings kept and observed in the said college (that is to say) on, &c. whereat shall be present the master, warden, assistants, senior and junior fellowes of the said college or the most part of them, at which time one of the senior fellowes shall first read so many

Regina v. The Master, &c. of God's Gift in Dulwich.

any other ordinances, &c., or statutes for the maintenance, &c., or ordering of the said college or of the said master, warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, or touching or in any way affecting the election or the mode of electing the master or warden of the said college. That before and at the time of the election hereinafter mentioned the said office of warden of the said college had become and was then vacant, and that on the 31st of March, 1851, a meeting of the master and fellows and assistants, six poor brethren, six poor sisters, and twelve poor scholars, in pursuance of notice theretofore in that behalf duly given, was duly convened and held in the chapel of the said college in Dulwich aforesaid, for the purpose of electing a fit and proper person to fill the office of warden of the said college so vacant as aforesaid, and that upon the said day of the said election of warden, the master, the assistants and fellows, after all of them were assembled, did decently and orderly go into the said chapel of the said college, and there after service and sermon made by one of the fellows of the said college, did then and there proceed to the election of a new warden of the said

of the statutes of the said college as shall concern the business then to be handled, and shall to the uttermost of their power take diligent care that the said statutes be truly observed and kept, and the warden of the said college shall at those times make his general account of all receipts and disbursements belonging to the said college by him had or made for the half year then last past, being prepared and surveyed before by the master, senior and junior fellows, at their private sittings, which accounts then be publicly read, and the master, assistants, senior and junior fellows then present shall hear and examine as well the same as also the accounts of other inferior officers of the said college, and at that audit day, on, &c. for ever, the warden of the said college shall clear his accounts for the years past, and what of the revenue or other profit of the said college shall then remain in his hands unexpended he shall bring in at the said audit, and the warden shall at that audit make known and declare what occasion there will be for the use of money for the year then next following, whereupon the Master, warden, and assistants, senior and junior fellows there present, or the most part of them, shall take order what money shall be employed upon those occasions, and how and in what manner it shall be employed, &c. And the said master, warden, assistants, senior and junior fellows of the said college, or some part of them, shall yearly, on, &c., view all the buildings of the said college, and what decay or defect they find in any of them to give order for the repairs and amendment thereof to be done at the charge of the said college, before the fourth day of September next following, to see and take view if the same be performed and repayed accordingly. And they shall at either of the said audit days let and grant leases of the lands and tenements belonging to the said college, &c.; and they shall hear and determine all matters of complaint or controversy brought unto them touching any persons then residing in the said college, &c. and determine if they or the most part of them can all other matters and things which do or may in any sort touch or concerne the said college or the good and orderly government thereof, &c.

94. Item. I ordaine that at all and every of the said private sittings the said master, warden, senior and junior fellows then present or the most part of them shall hear and determine all misdemeanors, &c. done or committed by any person in the said college against the statutes and ordinances thereof, and they shall hear, end, and determine all controversies which are brought before them which are raised or stirred up by any persons residing in the said college, and if yt shall happen at any time of these private sittings that any person of the said college shall be expelled from thence for any offence, and that such person shall thinck himself or herself wronged thereby, that then everie such person may appeal to the master, warden, assistants, senior and junior fellows of the said college at their next publique meeting, where the cause of his or her expulsion shall be at large debated by the master, warden, fellows, and assistants of the said college, &c.

Regina v. The Master, &c. of God's Gift in Dulwich.

college, and that the senior fellow then and there present did then and there publicly and audibly read such and so many of the before-recited ordinances as do express of what condition and quality the person elected to the said office of warden ought to be, and that thereupon the electors, to wit, the master, the assistants, and the fellows aforesaid, then and there proceeded to make the said election indifferently, without partiality, favor, or respect of persons, and there being then and there above the number of two, to wit, sixteen persons who stood to be elected to the said vacant office of warden of the said college, equal in blood and condition, thereupon the electors aforesaid then and there proceeded to elect by the voices of them, the said electors, two persons from among the persons who stood to be elected, and the persons who stood to be elected then and there passed by the voices of the said electors then and there present, and the said Richard William Allen and one John Hensleigh Allen were the two persons who were then and there declared by the said master to have, and who then and there, in fact, had the most voices, and then and there became and were, and were so then declared by the said master to be entitled to draw lots for the said vacant place of warden in such manner and form as in and by the said ordinances is expressed and provided in that behalf.

And that the said R. W. Allen thereupon then and there, and by direction of said master and fellows and assistants of the said college, and of the poor brethren, sisters, and scholars thereof, proceeded to draw lots for the said office of warden so vacant as aforesaid, after the manner in and by the said statutes and ordinances in that behalf provided, and thereupon two equal small rolls of paper being indifferently made and rolled up by the said master, in one of which rolls the words "God's Gift" were written, and the other roll being left blank, and so put into a box, the said box was thrice shaken up and down, and the said R. W. Allen being the elder of the two elected, that is to say, being older than the said J. H. Allen, then and there drew the first lot, and the said J. H. Allen being the younger person, then and there drew the second lot or roll so made and rolled up and put into the box as aforesaid, and the said R. W. Allen then and there drew the lot wherein the words "God's Gift" were written; and was then and there duly elected to the said office or place of warden of the said college, and then and there became and was entitled to be admitted forthwith into the said place or office of warden of the said college, and was then and there declared by the said master of the said college to be so elected and entitled as aforesaid.

That the said six assistants of the said college have always from the time of the foundation of the said college hitherto been used and accustomed as of right to join in and vote at the election of warden of the said college from time to time upon the occurring of a vacancy therein; that the said R. W. Allen, at the time of the said election, was and still is a person in all respects duly qualified to be and become warden of the said college, and to be admitted to fill the said office of warden so vacant as aforesaid, and in all respects a fit and proper person in that behalf, and was and is by means of the premises

Regina v. The Master, &c. of God's Gift in Dulwich.

duly elected to the said vacant office of warden of the said college; that the said R. W. Allen did thereupon, and within a reasonable time in that behalf, tender and offer to become bound, and was then and still is ready to become bound in such manner and for such sum and sums of money as in and by the statutes and injunctions of the said college in that behalf is required and provided, and did on the day of the said election, at his own charge, provide a dinner for the whole of the said college, and was ready and willing, and then tendered and offered to take the oath in and by the said statutes and ordinances in that behalf prescribed, and in the manner in and by the said ordinances pointed out, and to receive the sacrament of the Lord's Supper, as by the said ordinances provided, and to be conducted to his seat in the chapel and his lodgings in the college by the master and fellows then present, and to be forthwith admitted to the said place or office of warden of the said college so vacant as aforesaid; and the said R. W. Allen has always been and still is ready and willing to be admitted into the said place or office of warden of the said college, and to take upon himself the said place or office and the duties thereof, and faithfully and properly to discharge the same, and to do all other necessary and proper acts in that behalf, of all which said several premises the said defendants, the master and fellows, have always had notice, and have been requested by the said R. W. Allen to admit him to the said office of warden, and although a reasonable and proper time in that behalf hath elapsed, yet they have refused and neglected, and still do refuse and neglect to admit the said R. W. Allen to the said office of warden, so vacant as aforesaid, and to which he has been so duly elected as aforesaid, in contempt, &c. The writ then commanded the defendants to admit the said R. W. Allen into the said place or office of warden of the said college.

The return, after reciting the letters patent of the 21st of June, 1619, set out the deed of the 13th of September, 1619, and the instrument of the 29th of September, 1626, respectively executed by Edward Alleyne, as in the mandamus mentioned. It then stated the vacancy in the office of the warden of the said college, and the proceedings preliminary to the election, as set forth in the writ, except that it is stated that "John Hensleigh Allen and John Thomas Allen were the two persons who then and there had the voices of the said master and fellows; and that the said Richard William Allen, in the said writ mentioned, then and there had no voice of the said master and fellows, or any of them, but had the voices of the said six assistants, and each of them, by reason of a supposed right in the said assistants to vote at the said election, and no other voice or voices, whereas no such right in the said assistants was given in and by the said statutes, and the said R. W. Allen was then and there elected warden by reason and in consequence of the said voices of the said assistants so given as aforesaid, and not otherwise, which is the occasion of, and is the said supposed election of the said R. W. Allen, in the said writ mentioned; and so by reason of the premises in this answer mentioned in that behalf, the said R. W. Allen did not nor could become nor was duly elected to the said office or place of warden, so vacant as aforesaid, as suggested and alleged in the said writ.

Regina v. The Master, &c. of God's Gift in Dulwich.

Demurrer and joinder in demurrer.

Sir F. Kelley, for the prosecutor. The first objection raised is that by the statutes of the founder, the assistants have no voice in the election of a warden. The deed of endowment shows that lands in the three parishes of St. Saviour's, St. Botolph's, and St. Giles Cripplegate, were given to the college, and the 8th statute constitutes the churchwardens of each of these parishes the assistants. It was, therefore, plainly the object of the founder to bring the assistants constantly into operation in regard to the proceedings of the college. The question is, to what extent are they empowered to take a part. The provisions for the election of the warden are to be found in the 14th and following statutes. Notice of the intended election is to be sent to all the assistants. The 15th is the clause upon which the present question arises. It provides, that upon the day of election of warden "the master, the assistants, and fellows," after all or 'the most part are assembled, shall go to the chapel, and there *proceed* to the election of a new warden; and it requires that the senior fellow present shall read a part of the ordinances; "and after that the electors¹ shall make the said election indifferently, without partiality, favor, or respect of persons." Now, here the assistants are named, together with the master and fellows, and they are all to proceed to the election. All must, therefore, be equally included in the word "electors," which occurs afterwards, as there is nothing to raise any distinction, and no other ordinance at all defining who "the electors" are to be. The 20th ordinance, which provides for the event of both offices of master and warden being vacant at one time, leads to the same construction. In that case, the senior fellow is to "give notice to the assistants to make speedy repaire to the college, to joine with the fellows in the election of a new master," which is to be in all respects like the election of warden.

[*LORD CAMPBELL*, C. J. Is there any specific duty such as acting as scrutators or holding the ballot-box imposed upon the assistants?]

No; unless they are then to take part in the election, they are mere idle spectators of the proceedings. Wherever the assistants are not to take part in any election, no provision is made for summoning them; for instance, where poor brethren, sisters, or scholars are elected for the parish of Camberwell—*Ordinance 24*. The defendants will rely on the 41st statute, defining "the office of the assistants," and it will be argued that as they are to "be present at the college when the master and warden shall be elected," they are only to be present, and to take no part in the election itself. But any such inference cannot operate to restrain the clear meaning of the terms used where the mode of election is prescribed. The 94th and 101st statutes show, that the assistants are in some matters to act equally with the fellows in doing corporate acts.

[*COLERIDGE*, J. Still, not being corporators themselves, they stand

¹ It was agreed by both parties that the word "elector," in the 15th ordinance, must be read "electors," according to any view of the question.

Regina v. The Master, &c., of God's Gift in Dulwich.

on a different footing. If nothing were said about who were to elect, the members of the corporation would alone have the right at common law.]

If the implied right were relied upon, it would be not only in the master and fellows, but in all the members of the college collectively. However *expressum facit cessare tacitum*, and the provisions of the ordinances must alone be looked to. The invariable usage, as stated in the writ, has been to give the assistants a voice in the election, and that is a very strong additional argument in favor of the existence of the right. Secondly, assuming that the statutes give the assistants a voice at the election, it is said that the founder had no right to make such a provision, and that it is, therefore, void. Now, there is nothing inconsistent in the crown delegating to a private person the power of appointing under a charter.

[LORD CAMPBELL, C. J. That depends upon the nature of the powers delegated. The crown could not delegate the appointment of magistrates.]

The appointment to such an office as that now in question is open to no such objection: it is merely an office in a private corporation; and there are many instances existing where strangers to a corporation have the right of appointing the members of it. Here the charter itself prescribes no mode of appointment, but provides that it shall be according to the will of Alleyne.

[LORD CAMPBELL, C. J. The crown appoints mediately.]

In *Rutter v. Chapman*, 8 Mee. & W. 1; s. c. 10 Law J. Rep. (N. S.) Exch. 495, the majority of the Court of Exchequer Chamber held that the crown might even delegate to an individual the power of appointing the members of a municipal corporation.

[LORD CAMPBELL, C. J. What was there delegated was not the right of nominating the corporation, but the duty of ascertaining the individuals who filled a prescribed character.]

Upon this point, also, the contemporaneous usage is very important, as showing the legality of such a provision—*Grant's Law of Corporations*, p. 27. He also referred to *The Attorney-General v. Dulwich College*,¹ before Lord King, where the right of the assistants to vote at the election of wardens was established.

Greenwood appeared for the assistants, who also made a return to the writ, but he did not add any argument.

Sir F. Thesiger, contra. The allegation of invariable usage is quite immaterial to the present question; the defendants are therefore entitled to pass it over. The sole question is, whether the prosecutor, who had not a single vote of the master or any of the fellows, can be said to be duly elected.

[LORD CAMPBELL, C. J. I confess I should think the statement of the usage was a material allegation, if properly averred.]

The first point raised is, that the ordinances do not purport to give

¹ Cited in 4 Beav. 261.

Regina v. The Master, &c. of God's Gift in Dalwich.

the assistants a voice in the election. The charter does not specify whence the poor brothers, sisters, and scholars are to be selected. The ordinances limit the objects of the charity to the inhabitants of certain parishes. This, no doubt, the founder had power to do, because he thereby leaves the corporation as it was originally created. But he had no right to make the assistants members of the corporation, and he has not affected to do so. No doubt he has given them some right of interference in the affairs of the college, and if the ordinances can be so construed as to make the churchwardens of these three parishes the guardians of the interests of the corporation by watching over the administration of the funds, (see 121st Ordinance,) it will be a view which the court will adopt as more reasonable than the very intimate connection with the rights of the college contended for on the other side. The 2d ordinance draws a manifest distinction between the six chanters, who "are to be esteemed as junior fellows, every one of them to have his voice according to the statutes, as the four senior fellows have," and the assistants who are appointed "*touching the ordering of the said college, and the rents, revenues, and profits thereof.*" The 41st Ordinance, defining the office of the assistants, shows clearly that their duties are connected with the management of the revenues of the college, in respect of which they have a species of control over the corporation. This is a reasonable provision, as they are the officers of the parishes in which the college property lies. The terms of their oath, too, in the 28th statute, favors this view. They are not to *consent* to the breaking of any of the ordinances or to the alienation of any of the lands or property of the corporation, or to any act which may prejudice the college. Whereas the oath of the master and warden is directed against any attempt by them to alter the foundation or ordinances, or to disturb the college or waste its property. The presence of the assistants, under the 13th Ordinance, is only required in order that there should be as much ceremony as possible. On other important occasions they are not required to be present. It is remarkable that they should not equally have a voice in electing the fellows, which they have not, (21st Ordinance.) It was to guard against giving a voice to others than members, which would be contrary to law, that the founder, in the 15th Ordinance, provides that "the *electors* (not the several persons before named) shall make the said election." The assistants would not be members properly.

[LORD CAMPBELL, C. J. But what is there to show who are the electors?]

We are not bound to show who are the electors, but only that the assistants are not electors. As far as any intention is to be gathered, it would seem that the senior members of the college only, such as the fellows, should have voices. Where the assistants are to have voices, the founder gives the right expressly. Under the 20th Ordinance, standing alone, it could hardly, perhaps, have been objected that the assistants had not a right to "join" in the election; but that ordinance is directed only to the extraordinary case of a double vacancy; and consistently with the other ordinances it may be said

Regina v. The Master, &c. of God's Gift in Dulwich.

that, even on that occasion, no more than their presence is required. Then, secondly, as to whether the founder had power, by law, to confer this right. It is not necessary to consider whether the crown could grant any such power, as the charter in this case does not confer the power. The assistants are not made members of the corporation, and it is contrary to the common law that strangers to a corporation should be electors. *Sutter's case*, 10 Rep. 33, *b*, 34, *a*, and the case of *Rutter v. Chapman* are distinguishable from the present consistently with that rule of law. It is also contrary to the provisions of the 33 Hen. 8, c. 27, that the assistants should be able to join with the minority and overrule the voices of the majority. The founder may limit the number of electors — *The King v. Bird*, 13 East, 367; but he cannot confer the right of voting on a stranger, and thus, without any authority given in the charter, add to the electoral body. The statutes are not to have greater effect than the by-laws of a corporation, nor can the power to make them be put higher than the power to make by-laws. What may have been the usage hitherto cannot be taken as warranting a practice which is found to be contrary to law — *The Queen v. Kendall*, 1 Q. B. Rep. 366; s. c. 10 Law J. Rep. (N. S.) Q. B. 137. The decree of Lord King, referred to in *The Attorney-General v. Dulwich College*, declared that the founder of this corporation could not add any person to the corporation or make any new person a member of the body corporate; although he could appoint assistants to the corporation; and in the case in which that decree is referred to, it is expressly held that the founder had not the power of creating additional members. It would be varying from the powers of the charter to allow the assistants to vote, and therefore the mandamus ought not to go.

Sir F. Kelley, in reply. It seems to be admitted that the 20th Ordinance standing alone would give the assistants a right to vote, and there is nothing in the other ordinances to require a different construction. As to the other question, there is no authority to show that a stranger may not vote in the election of a corporate officer. A by-law, no doubt, cannot create a new class of persons as voters; but no authority shows that members of a corporation may not be elected by some who are not corporators.

[*COLERIDGE, J.* The Fellows of New College elect the warden of Winchester.]

There are several similar cases; and if the Crown may grant the power, it is not against law, and there is no semblance of authority for the proposition contended for.

[*PATTESON, J.* Persons who elect boys to the Charter House are not members.]

Sutton's case shows that a person not a member may have the right to vote. Upon principle, it might be said that in the case of municipal corporations the Crown could not delegate the power which it possesses; but a very different principle would apply in the case of a charitable corporation founded for the purpose of being carried into effect through the pecuniary gift of the founder himself.

Regina v. The Master, &c. of God's Gift in Dulwich.

There is nothing unreasonable in the power here given to the assistants. The stat. 33 Hen. 8, c. 27, can have no bearing on the question.
Cur. adv. vult.

The judges now severally delivered their opinion.

LORD CAMPBELL, C. J. I am of opinion that there should be judgment for the Crown upon the construction of these statutes. By the second article there are to be six assistants "touching the ordering of of the said college and the rents, revenues, and profits thereof," and the founder afterwards shows that these persons are to be the churchwardens of three specified parishes. These assistants claim the right of voting at the election of warden. We must, therefore, see what provision he makes for the election of warden. This is provided for by the 15th statute, whereby he declares that on the day of election, the master, fellows, and assistants, thus classing them all in the same category, "after all or the most part of them be assembled, shall decently and orderly go into the chapel, and there after service and sermon made by one of the fellows, proceed to the election of a new warden." Who are to proceed? Why, the master, the assistants, and the fellows. The senior fellow is publicly to read such of the ordinances as express of what condition and quality the person elected ought to be, and after that *the electors* shall make the said election indifferently, &c. Now, there are no electors pointed out anywhere else, excepting in the 20th statute, which I shall afterwards notice. Who then are the electors? It is before said that the master, assistants, and fellows shall proceed to the election, and therefore upon that ordinance alone I should have no doubt that the assistants have a voice. We then come to the statute 20, which provides "that if both the places of master and warden shall happen to be void at one time, that then the senior fellow then present shall within twenty-four hours give notice thereof to the assistants to make speedy repair to the college within three days after to join with the fellows in the election of a new master." Notice is to be given to the assistants, but there is no need to give it to the fellows who are in-dwellers of the college. Here there is an express declaration in the most positive language that the assistants are to *join with the fellows in the election*. What the fellows may do the assistants may do, and the election is to be their joint act. It was admitted that if the case had stood on these two statutes alone, the language was too clear to be doubted, but it is said that we must look to the rest of the statutes. Now, I can discover nothing in them to show that it was the intention of the founder that the assistants should not have a voice in the election. It is said that it is improbable that he should call in the churchwardens for this purpose; but they belong to the parishes in one of which he was born, and in all of which the property given to the college is situated, and at that period churchwardens were usually persons of note and eminence, and might well assist the fellows in their election. Then, is there any thing in the oath inconsistent with the assistants having a voice? I think not. The oath is silent upon this point, but by it the

Regina v. The Master, &c. of God's Gift in Dulwich.

assistants swear that they will obey the statutes and will act as is provided thereby. The oath of the fellows, who it is allowed have the elective franchise, is substantially to the same effect. We are then referred to the 41st statute, defining the office of the assistants, and it certainly deserves consideration. — [His Lordship read that statute.] — But this, instead of being against the interpretation I have put on the other statutes, goes strongly to confirm it. The assistants are to be present when the master and warden are elected; what are they to do? If it were provided that they were to hold the box containing the lots, it might be supposed that they were to be present to perform that duty. But they are "to join in the election," and therefore it must be intended that they are to be present for that purpose. If there were any doubt on the subject, the usage stated in the writ might be referred to as aiding this construction. Usage contrary to the words of a charter, ordinances, or by-laws cannot be supported; but it may be if it is consistent with them, and may give an interpretation to the words if they were doubtful.

But it has been argued, secondly, that if such were the intention of the founder, what he has done is contrary to law. The charter being a grant to William Alleyne of power to found the college and to make statutes, he in the same year (1619) founds the charity but he does not then make any ordinances. Still his power to make them remained, and he did so in 1626. This lapse of time could not affect the exercise of the power, and the power itself is such an one as the Crown might well delegate to him. But it is said that he had no power to give the assistants a right of voting for a corporate officer, they not being themselves corporators. It is quite clear that the founder, after having founded the college, could not alter its constitution as prescribed by the charter, which provides that it shall consist of one master, one warden, and four fellows; but he himself follows this language of the charter in his ordinances, and so cannot be supposed to intend any alteration. But he might do what was necessary for the maintenance of the charity: that power still remained vested in him. No authority has been brought forward to show that it is essentially necessary that on the first foundation of such a corporation no one but the corporation itself can be invested with right of naming corporators. *The King v. Bird* was relied on, but that only shows that where a corporation has been once established the introduction of a non-corporator vitiates. I quite agree with that case; but here until the statutes are made the power given by the charter had not been exercised by the founder, and no mode of election established. When he makes the statutes, he, for the first time, declares that the assistants shall have a voice in the elections. We are referred to no authority to show that it is not a good exercise of the power; and we know, in point of fact, that there are many instances where members of a corporation are nominated by those who are not themselves members; and these statutes must be considered as sanctioned by the charter under which they were made, and so the right of voting conferred on the assistants is derived from the Crown itself. The 33 Hen. 8. c. 27, was relied on, but I am at a loss to see its application

Regina v. The Master, &c. of God's Gift in Dulwich.

to this case. Then, there is a clear distinction to be taken between the assistants and the chanters, who are added by the second ordinance, the latter being directed to be considered as members of the corporation; in this respect the founder altered the corporation, which he had no power to do, as the chanters were not members of the corporation before. This is the view taken by Lord King in the case referred to, who decided that the founder could not add the assistants to the corporation as members of it, but ordered that they should be admitted to be assistants to the corporation, according to the ordinances, and be quieted in the possession thereof. That is a solemn adjudication that the assistants, as such, were well created. It seems to me, therefore, that both with regard to the meaning of the statutes and the authority to make them, we have the high authority of Lord King that the assistants have a right to vote. I think, therefore, that a peremptory mandamus should be awarded.

My Brother Wightman, with whom I have discussed this case, and who is absent at Guildhall, authorizes me to say that he entirely concurs in the opinion arrived at by the rest of the Court.

PATTESON, J.—The first question is, whether the founder has by these statutes constituted the assistants electors for the office of warden. The statutes which have already been referred to by my Lord seem obviously to confer that power, and I cannot find any thing to give them a different sense, or to show that it was intended that the assistants should only be present, whatever construction the statute as to the office of assistants might have had if it stood by itself. But, besides this, we have a contemporaneous and continuous exposition of the statute; we must, therefore, take it that the founder has made the assistants electors. The second question is, whether he could do so by law. Upon this I have had some doubt, arising from the fact, that the statutes were not made until a considerable time after the charter was granted, but I am now satisfied that this makes no difference, and that the founder might make them electors. The establishment of a corporation must be the act of the Crown, but it may be delegated to an individual to select who shall be the members, what its duties shall be, or how the members shall be elected. Whether that be done at the time of the incorporation, or by a separate instrument is, I think, immaterial. Therefore, this case is different from *The King v. Bird*, where it was attempted by a by-law made subsequent to the establishment of the corporation, to delegate the power of electing to a stranger. I cannot, therefore, doubt that the Crown might make the assistants electors, or that the founder might do so also. The words of the charter are large enough to embrace all constitutions relating to the continuance of the corporation as well as in all other respects. Unless we give them that meaning, the founder would not seem to have a right of defining the qualifications of the members. He could not add to or alter the parts of the corporation, and so it was held by Lord King. If the distinction between junior and senior fellows were now to rise for the first time, I do not say what my opinion might be. But Lord King also held that the assistants were properly appointed according to the ordinances, and thereby, in effect, decided that this was a good exercise of the power.

Regina v. The Master, &c. of God's Gift in Dulwich.

COLERIDGE, J. I am of the same opinion, though I have arrived at it more slowly than the rest of the court. The first question is purely one of construction: What has the founder ordained? The second: Supposing that he has made the assistants electors, could he do so? As to the first, the most important things to be looked at are the statutes themselves. Looking to their ordinary meaning and language, I think it was intended and so stated that the assistants should have votes as electors. Besides, there being an uninterrupted usage to this effect, I feel that we cannot do otherwise than say that they are entitled to vote. The second statute is the first place where they are mentioned. If this were *res integra*, I should think it extremely doubtful whether the chanters do not stand in just the same light as the assistants, and that the founder never intended to make them members of the corporation. The simple argument that he gives the junior fellows votes does not affect the question, for that is the question we are now considering. But after saying what the junior fellows are to do, he says that there are to be thirty members. Now, if you add up the numbers, you will find that with the junior fellows they amount to thirty-six; therefore I do not think that he intended to make them members. The 7th statute is important, as it is not immaterial to see whether the assistants are to take part in the election of any other members besides the warden and master. Now, as to the poor scholars, selected from their several parishes, they have by that statute the selection solely in themselves. The 8th statute makes them assistants to the master and warden in the governing of the college, which is certainly a very general expression. The 10th statute is also material, because as they had to place the poor children on the list by the 7th statute, so here they have similar powers in regard to the poor brothers and sisters, whom they have to place in the almshouse; and if any of these marry or misconduct themselves, the assistants alone can expel them. The 15th statute is the one as to the election of the warden. No one reading that statute would have any other impression than that all the persons who are to go through these preliminaries are to take a part in the election. The question is, whether the words at the end of that statute raise a reasonable doubt, whether the electors are any other than the specified persons who have been singled out before. I own I think there is no such doubt. The 20th statute is quite consistent with the 15th. We should be doing violence to the words if we supposed they referred to any thing but a taking part in the election. If any such doubt existed, it is cleared up by what is said at the end, that the election shall be like that of warden. The 24th statute is worth regarding. There express power is given to the master and warden, without the assistants, to elect. Where it is intended that the assistants should not interfere, it is expressly so stated. If the matter had rested here, there would have been no doubt. But a doubt is raised by the form of the assistants' oath, which is said to be different from that of the fellows. That difference is entirely referable to the fact of the assistants not being members of the corporation body, but a sort of inspectors over the rest, and having a duty to see that the others keep the

statutes. The 41st statute might at first raise some slight doubt. It is said the last words imply that the assistants should only be present. Even if that were so, I think it would not be strong enough to do away with the former provisions. They are to repair to see the audit, and according to the argument of the defendants, they could take no part in it. But it is clear that they are to take a part; and it is consistent that they may take a part in the election. Looking, therefore, to the statutes, together with the usage which has prevailed, I have come to the conclusion that the founder intended and has expressed the intention, that the assistants should vote at the election.

The second question is, supposing this to be so, whether it is according to law? and the objection made is, that the assistants, not being members of the corporation, cannot legally take part in the election of members; and also that the statutes, being made after the charter, cannot affect it. As to the last objection, where the Crown gives power to a founder to make statutes, these statutes must in many cases be posterior to the incorporation, and no such objection appears ever yet to have been raised. As to the other point, the act of the founder must be considered as the act of the Crown; and the question is, whether the Crown had power to make the assistants electors? In the case of *Sutton's Hospital*, in the seventh resolution, it is said, where the king by his charter reserves as well the nomination of the persons as the name of the incorporation to a common person who shall be the founder, there he ought to name the parties and declare by what name they shall be incorporated, and there many times, although it be superfluous, he uses these words *fundo, erigo, &c.*, or such like, and when the common person has done it, and declared it in writing, according to his authority, then they are incorporated by the king's letters patent, and not by the common person, for he is but an instrument, and the king makes the corporation in such case in the same manner as if all had been comprehended in the letters patent themselves, for it is true that none but the king alone can create or make a corporation, as it is held in 49 Edw. 3, 4 a, 49 Ass. 8, but "*qui per alium facit per se ipsum facere videtur.*" As my Lord has said, I can find no authority for the restriction contended for, and we are all aware of cases where the members of a corporation are elected by strangers; for instance, New College elects the warden of Winchester. In like manner the owner of Audley End nominates to the mastership of Magdalene College, Cambridge, and the king may by charter in express words grant to a commonalty or corporation to make another commonalty or corporation. Bro. Abr. "Prerogative le Roy," pl. 53. For example, the Chancellor of the University of Oxford has a right of creating corporations in Oxford. If this be so, why may not the Crown empower its nominee to state that some other corporation or individual may take part in the election of corporators? Possibly, there might be some difficulty in the case of an individual where there is no succession; but that difficulty does not arise here, because these assistants are the churchwardens of certain parishes, and for some purposes a corporate body. I am, therefore, of opinion, that a peremptory mandamus ought to go.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHE-
QUER CHAMBER,

DURING THE YEARS 1851-52.

COLLINGRIDGE *v.* PAXTON.¹

November 24, 1851.

Levy—1 & 2 Vict. c. 110, s. 12—*Bank Notes*.

Bank notes and money seized under a *fi. fa.* are subject to the same rights and liabilities as goods are when so seized, and cannot be appropriated by the sheriff under stat. 1 & 2 Vict. c. 110, s. 12, to satisfy a *fi. fa.* against the execution creditor.

Phlipson showed cause against a rule calling on the sheriff of Oxfordshire to show cause why he should not pay over to the plaintiff 313*l.* 17*s.*, or why he should not pay over 13*l.* 17*s.*, part of the same. It appeared from the affidavits that the plaintiff had, in June, 1851, obtained judgment by default against the defendant for 300*l.* and had issued an execution thereon, indorsed to levy 300*l.* debt, and 13*l.* 17*s.* costs. The sheriff, being ruled to return the writ, returned that he had taken goods and chattels to the value of 313*l.* 17*s.*, consisting of notes of the Bank of England to the amount of 310*l.*, and gold and silver to the amount of 3*l.* 17*s.*, which he had appropriated and paid over in part discharge of another writ of execution for 600*l.*, lodged with him shortly before the levy, in an action against the now plaintiff at the suit of Sir Henry Dryden. It is submitted that the sheriff had a right, and was fully justified in appropriating this money, at least to the extent of the bank notes, to the execution at the suit of Sir Henry Dryden. The 1 & 2 Vict. c. 110, s. 12, enables the sheriff to take in

¹ 16 Jur. 18; 21 Law J. Rep. (N. S.) C. P. 39.

Collingridge v. Paxton.

execution bank notes and money, and directs him to "pay or deliver to the party suing out such execution any money or bank notes which shall be so seized;" therefore, the moment the sheriff has so seized such notes, they become, as between him and the execution creditor, the notes of such execution creditor, and may be taken as such to satisfy a *fi. fa.* against such creditor.

[MAULE, J. Could such creditor have maintained an action of trover for them against the sheriff?]

It is not necessary, it is submitted, to go to that extent in the argument, although it is possible such action might lie; but following the language of the 12th section of the act, the sheriff may, if he pleases, pay over to the execution creditor the notes which have been seized: has he not, therefore, a right to appropriate the notes, so as to vest them in such creditor, and to be applicable to any writ of execution against such creditor? The case of *Wood v. Wood*, 4 Q. B. 397, is distinguishable from the present one. There there had been no appropriation by the sheriff of any specific money, and the money in the hands of the sheriff, being the proceeds of a sale, was considered to be only a debt from him to the execution creditor. So also, in like manner, the cases of *Robinson v. Peace*, 7 Dowl. 93, and *Masters v. Stanley*, 8 Dowl. 169, differ from this case, as here the specific money which had been seized was appropriated by the sheriff to the second execution.

Channell, Serj't, appeared for Sir Henry Dryden, as notice of the rule had been given to him, but being objected to, was not allowed to be heard.

Hawkins, in support of the rule, was stopped by the court.

JERVIS, C. J. I am of opinion that this rule must be made absolute. The only difficulty arises from the endeavor to give a limited construction to the statute. The words "pay or deliver to the party suing out such execution any money or bank notes which shall be so seized" are said to give the property in these notes to the execution creditor. I think, however, that the meaning of the act is to put money or bank notes on the same footing as goods; they could not be seized in execution except by virtue of this statute, but by that it is intended to make them seizable, and subject to the same rights and liabilities applicable to goods seized. Inasmuch, therefore, as these notes represent only the proceeds of goods, and such proceeds cannot be applicable to the debt of the execution creditor, these notes cannot, in my opinion, be made applicable to an execution against such execution creditor.

MAULE, J. I am of the same opinion. The intention of the act was to subject money or bank notes to its operation. The ordinary rule is, that what is seized under a *fi. fa.* is not the property of the execution creditor by the act of the seizure, but that it is the duty of the sheriff to pay over the proceeds of the same to him. I think, that in

Wedlake v. Sargent.

the case of money or bank notes, the intention was to put them in the same situation as goods were before the statute, but that, as they were already money, it was not necessary that they should be sold; on the contrary, they might and should be treated as money, and as such paid over to the execution creditor. So also the execution creditor might, perhaps, say to the sheriff, "Instead of selling, pay over to me the money and bank notes which you have seized;" but such a right does not vest in him the property which has been so seized. I do not think it convenient to carry further this kind of property, which is now by the act made seizable, than could have been done as to property anciently seizable before the act. According to the argument of Mr. Phipson, these notes might, whilst in the hands of the sheriff, have been seized under a *fi. fa.* against the execution creditor, although, if they had been goods and chattels instead of notes, they could not have been so seized; this, however, would be holding that a right of action could be seizable under the *fi. fa.* I do not think that such is either within the words or spirit of the act, which meant only to put money on the ordinary footing of other things which might be seized under a writ of execution.

WILLIAMS, J. The words of the section do not expressly alter the property in what is seized. The only question then is, whether it is necessary to construe the act thus. Now, so far from this being necessary, much inconvenience would arise if it were so construed; all of which would be avoided by holding that money seized under a *fi. fa.* by virtue of this act is to be the same as money derived from the proceeds of a sale of goods seized under a *fi. fa.* in the ordinary way.

Rule absolute.

COUNTY COURT APPEAL.

WEDLAKE & others v. SARGENT.¹

December 1, 1851.

Summons and Particulars, Sufficiency of — Time for taking Objection to same — Release — Evidence of Fraud.

The summons in the county court stated, that the defendant was summoned to answer a claim of the plaintiffs to recover 40*l.* 10*s.* and the particulars were — "To sinking a shaft at" &c.; "Cr. — Cash on account, £" &c., making the balance the same as the sum claimed: —

Held, that the summons and particulars showed a sufficient ground of action, without stating that the shaft was sunk for the defendant, or further disclosing how he was sought to be made liable for it.

Held, also, that the objection was one which could not be taken after the defendant had pleaded in the county court.

The work was proved to have been done for the defendant by the plaintiffs jointly, but the defendant produced in evidence a release to him from one of the plaintiffs, a markman,

Wedlake v. Sargent.

who was proved to have executed it in the presence of the clerk of the defendant's attorney on the morning of the day of trial, without the knowledge of the other plaintiffs. The purport of the deed was, however, proved to have been explained to the releasing plaintiff, who was said to have told the witness that he was no party to the present action:—

Held, that the above amounted to some evidence of the release having been given fraudulently, and the judge of the county court was, therefore, not bound to give effect to it.

THIS was an appeal from the county court of Devonshire, at East Stonehouse. In the case it was stated, that the defendant was summoned "to answer a claim of John Wedlake, William Dunstone, William Holman, Thomas Trace, William Leigh, and James Rule, miners, to recover 40*l.* 10*s.*" The particulars of demand were as follows, viz.:—

" 1846.	£	s.	d.
" To sinking a shaft at Ivy Tor Mine, in the parish of			
South Taunton, three fathoms, - - - - -	50	0	0
To putting up a machine, - - - - -	1	0	0
To cash paid for turf for drying clothes, - - - - -	0	10	0
	<hr/>		
Cr.	£51	10	0
Cash on account, - - - - -	£8	0	0
Ditto, - - - - -	3	0	0
	<hr/>		
	11	0	0
	<hr/>		
	£40	10	0"

At the hearing of the summons, on the 2d September, 1851, both the plaintiffs and the defendant appeared by attorney. The defendant pleaded, first, the general issue; secondly, payment; thirdly, a release of all causes of action by William Dunstone, one of the plaintiffs, on behalf of himself and his co-plaintiffs. After making these answers, the defendant's attorney objected that the summons and particulars were insufficient to explain what was the ground of action. The judge ruled, that, after the pleas to the effect above mentioned had been received, this objection was too late, and the hearing of the case proceeded. The plaintiffs proved that work to the amount claimed had been done by them in a contract taken in copartnership, as is usual with men employed in the business of miners, and under the direction of an agent for the shareholders in the Ivy Tor Mine, of which mine the defendant was proved to be a shareholder, and to have attended meetings in that character, and taken an active part in the conduct of the said mine, both before and after the performance of the work by the plaintiffs. The case for the plaintiffs being closed, a witness was called on behalf of the defendant, who produced a release under seal, of which a copy was set out in the case, and proved its execution by William Dunstone, one of the plaintiffs, who had affixed his mark thereto, in the presence of the said witness, on the morning of the day on which the cause was heard before the judge, neither of the other plaintiffs or their attorneys having had any knowledge of the existence of such a document. The following is a copy of the release:—"Know all men by these presents, that I, William

Wedlake v. Sargent.

Dunstone, of Liskeard, in the county of Cornwall, miner, having been engaged in sinking a shaft, and performing other work, at Ivy Tor Mine, in the parish of South Taunton, in the county of Devon, together with John Wedlake, of &c., William Holman, of &c., Thomas Trace, of &c., William Leigh, of &c., and James Rule, of &c., in the year 1846, do hereby remise, release, and discharge Thomas Sargent, of &c., of and from all claims and demands, past or present, for or on account of any costs, charges, labor, or expenses, actions, or causes of action, already prosecuted or hereafter to be prosecuted, either incurred by the said Thomas Sargent individually, or as a shareholder or adventurer in the said Ivy Tor Mine, or in any other mine whatsoever. Sealed with my seal. Dated the 2d September, 1851." The substance of the evidence of Thomas Milton was then set out; it was as follows:—"I know William Dunstone, the plaintiff; I saw him execute this deed this morning, and attested it in his presence." On his cross-examination the witness said, "I am clerk in the office of Childs & Peter, attorneys, of Liskeard. I went to look for Dunstone; he told me he was no party to this action. I explained the purport of this deed to him, and he executed it." No evidence was called in reply by the plaintiffs to contradict or impeach this. The judge of the county court reserved its judgment until the 16th September, and then gave a judgment for the plaintiffs for the full amount claimed, remarking that the release was evidently a trick. The case stated that the opinion of the court was sought, first, whether the summons and particulars sufficiently disclosed and explained the ground of action against the defendant, and if not, whether the objection to their sufficiency ought to have been allowed by the judge after the pleas had been received; secondly, whether the judge was bound to give effect to the release executed by William Dunstone, one of the plaintiffs, as above set out, or whether it was open to him, upon a consideration of all the circumstances of the case, and a general view of all the evidence given on the trial, to consider it, as he did, fraudulent, and to give no effect to it.

Collier, for the appellant. The first point is, whether the summons and particulars, taken together, disclose sufficiently a cause of action. It is submitted that they do not, for it does not appear from them that the plaintiffs sunk the shaft for the defendant, or in what manner he was sought to be made liable for the expense of sinking it; it might be that he was charged with it as a director or a shareholder of the mine, or upon a guaranty or other collateral engagement.

[WILLIAMS, J. The particulars are perfectly good, and give sufficient information. The defendant is stated by them to be "a creditor" in respect of cash on account; so that it must plainly be understood that in what goes before, namely, "to sinking a shaft," &c., he is treated as a debtor.]

But it is not shown in what capacity he is liable, nor that the work was done for him at his request. Next, the objection was one which could be taken after the defendant had pleaded. Sect. 75 of stat. 9 & 10 Vict. c. 95, provides that no evidence shall be given on the trial,

Wedlake v. Sargent.

except such as is stated in the summons; therefore objection may be taken to any evidence being given as to the capacity in which the defendant was charged for the work.

[MAULE, J. The 78th section declares, that in cases not expressly provided for by the act or rules, the general principle of practice in the superior courts is to apply. Now, there is a class of objections, and this is one of them, which ought to be taken as soon as possible. This is like an objection to the form of the declaration, which should be taken by way of demurrer, and is consequently cured by pleading.]

The remaining point is, whether there was any evidence before the judge of the release having been given in fraud of the other plaintiffs. It is admitted, that if there was any evidence of such fraud, the present objection cannot prevail; but here there was no legal evidence on which a judge could have rightly directed a jury to find the release fraudulent.

[MAULE, J. It is stated that the judge gave judgment for the plaintiffs, "remarking that the release was evidently a trick." Now, it is certainly no matter what remarks were made by him; we cannot look at them, but only at the judgment and the evidence.]

No; and the evidence showed that the releasing plaintiff never wished to bring the action, as he stated he was no party to it, and he had the purport of the deed explained to him before he executed it.

Coz, contra. The question as to the fraud is one of fact, and therefore cannot be inquired into by this court.

[MAULE, J. Suppose there was no evidence whatever of fraud, would not a judge be bound to direct a jury accordingly? Or a bill of exceptions might be tendered.

WILLIAMS, J. What is the fraud here?]

That is not set out, but may be collected from the circumstances of the case. There was sufficient evidence, it is submitted, from which the judge might have found as he did.

Collier, in reply.

[MAULE, J. It is clear that this releasing plaintiff had, with the other plaintiffs, a joint interest in the cause of action. Then he is an illiterate person, unable to write, and is sought out by the clerk of the defendant's attorney to give this release. There is no reason why he should have given the release, and I think fraud may be therefore readily inferred.

TALFOURD, J. It is singular that the release does not refer to the action that was pending.]

It is submitted that fraud ought to have been clearly proved, and not presumed.

MAULE, J. It is not necessary to say how I should have found on these facts; but I cannot but say that there was, I think, some evidence of fraud.

WILLIAMS, J. I certainly think that there was evidence from which

 Clack v. Sainsbury.

the judge might have found this deed to have been given fraudulently; and the appeal must, therefore, be dismissed.

TALFOURD, J. concurred.

Appeal dismissed, with costs.

CLACK v. SAINSBURY.¹

November 20, 1851.

Usury—Exemptions—Bills at Three Months—Security on Land—Statutes 12 Anne 2, c. 16, s. 1; 3 & 4 Will. 4, c. 98, s. 7; 2 & 3 Vict. c. 37, s. 1.

The statute 3 & 4 Will. 4, c. 98, s. 7, which exempted from the provisions of the Usury Act (12 Anne 2, c. 16, s. 1,) bills of exchange not having more than three months to run, is not repealed by the statute 2 & 3 Vict. c. 37, s. 1, which, and the statutes continuing it, exempt from the operation of the usury laws all bills not having more than twelve months to run and all contracts above £10, provided there be no security upon land.

Therefore, bills not having more than three months to run, though for more than £5 per cent. interest, and though there be further security on land, are not void.

Assumpsit, on a bill of exchange for 40*l.* drawn on the 15th of November, 1850, by the defendant upon and accepted by Charles Bromley, payable at two months after date; and for money lent, and on an account stated.

Plea — That heretofore, to wit, on the 13th of September, 1850, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said C. Bromley and the plaintiff, that he, the plaintiff, should then, to wit, on the day and year last aforesaid, lend and advance to the said C. Bromley a certain sum of money, to wit, the sum of 37*l.*; and that the plaintiff should forbear and give day of payment thereof to the said C. Bromley, from the day and year last aforesaid until and upon a certain day, to wit, the 15th of November, 1850; and that for the loan of the said sum of 37*l.*, and for giving day of payment thereof as aforesaid, the said C. Bromley should give and pay to the plaintiff, on the said 15th of November, 1850, more than lawful interest at and after the rate of 5*l.* per cent. per annum on the said sum of 37*l.*, that is to say, the sum of 3*l.*, making, together with the said sum of 37*l.* so to be lent and advanced as aforesaid, the sum of 40*l.*; and that for securing such payment to the plaintiff of the said sum of 40*l.*, the said C. Bromley should then, to wit, on the said 13th of September, 1850, deliver to the plaintiff a certain bill of exchange, bearing date the 12th of September, 1850, and to be drawn by the defendant upon and accepted by the said C. Bromley, for the payment to the order of the defendant of 40*l.* two months after the date thereof, and indorsed by

¹ 21 Law J. Rep. (N. S.) C. P. 41.

Clack v. Sainsbury.

the defendant in blank. That the plaintiff in pursuance of the said corrupt and unlawful agreement, did then, to wit, on the 13th of September, 1850, lend and advance the said sum of 37*l.* to the said C. Bromley, on the terms aforesaid; and the said C. Bromley, in pursuance of the said corrupt and unlawful agreement, and upon the terms thereof, and for the purpose in that behalf aforesaid, did thereupon, then, to wit, on the 13th of September, 1850, deliver to the plaintiff such bill of exchange as last aforesaid, and thereupon the plaintiff took and received the said last-mentioned bill of exchange in pursuance of the said corrupt and unlawful agreement, and on the terms thereof, and for the purpose of securing the said repayment to the plaintiff of the said sum of 37*l.* so lent and advanced by him as aforesaid, and the said payment of the said sum of 3*l.* for such interest as aforesaid, which interest exceeds the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the form of the statute in such case made and provided. That afterwards, and when the said last-mentioned bill of exchange was due and payable according to the tenor and effect thereof, to wit, on the 15th of November, 1850, it was agreed by and between and amongst the plaintiff and the defendant and the said C. Bromley, that, in consideration of a certain sum of money, to wit, the sum of 3*l.* to be paid by the said C. Bromley to the plaintiff, further time should be given by the plaintiff for the payment to him of the said sum of 40*l.* in the said last-mentioned bill of exchange specified, to wit, until the 18th of January, 1851; and that for securing payment thereof as last aforesaid the defendant should make his other bill of exchange in writing, directed to the said C. Bromley, whereby the defendant should require the said C. Bromley to pay his, the defendant's, order the sum of 40*l.* two months after date thereof, and that the said C. Bromley should accept the said last-mentioned bill of exchange, and that the defendant should indorse and deliver the same to the plaintiff, and that the said last-mentioned bill should be taken and received by the plaintiff in renewal of and substitution for the said bill of exchange in this plea first mentioned. That afterwards, to wit, on the day and year last aforesaid, in pursuance of the said last-mentioned agreement, he, the defendant, did make and the said C. Bromley did then accept such bill of exchange as in that behalf aforesaid, and the defendant did then indorse and deliver the same to the plaintiff, who did thereupon, then and in pursuance of the said last-mentioned agreement, take and receive the same in renewal of and substitution for the said bill of exchange in this plea first mentioned, and for the purpose of securing repayment to him, as in that behalf aforesaid, of the said sum of 37*l.* so lent and advanced by him to the said C. Bromley, upon such corrupt and unlawful agreement as aforesaid, and the payment of the said first-mentioned sum of 3*l.* for such interest as aforesaid, which said bill of exchange in this plea secondly mentioned was and is the said bill of exchange in the said first count mentioned. That there never was any other consideration, except as in that behalf aforesaid, for the said indorsement and delivery by the defendant to the plaintiff of the said last-mentioned bill of exchange or for the plaintiff

Clack v. Sainsbury.

being the holder thereof, and the plaintiff hath always held and now holds the same for and upon such consideration, as in that behalf aforesaid, and not for or upon any other consideration whatsoever. Verification.

Replication. That each of the said contracts and bills of exchange in the said second plea mentioned was made and entered into, drawn and accepted, and indorsed respectively, and the said several matters and things therein mentioned occurred and took place as in the said plea respectively alleged, after the coming into operation of a certain statute, made and passed in a session of parliament held in the 3rd and 4th years of William the Fourth, intituled "An Act for giving to the Corporation of the Governor and Company of the Bank of England certain privileges for a limited period," and while the provisions of the same statute were and remained in force and unrepealed. That the said contract or agreement for the said loan and the said loan in the said second plea mentioned, were made upon security of the said bill of exchange in the said second plea mentioned, which was made payable within three months, that is, two months from the date thereof, and not otherwise. Verification.

Rejoinder. That each of the said contracts and bills of exchange in the said second plea mentioned, was made and entered into, drawn, accepted, and indorsed respectively, and the said several matters and things therein mentioned occurred and took place as in the said second plea respectively alleged, after the passing and coming into operation of a certain statute, made and passed in the first year of the reign of her present Majesty Queen Victoria, intituled "An Act to except certain bills of exchange and promissory notes from the operation of the laws relating to usury," and after various other acts (recited in the rejoinder,) the last being the 8 & 9 Vict., which continued in force. Verification.

Demurrer.

Phinn, in support of the demurrer. The plea is bad, since it sets up a defence under a repealed statute. The 12 Anne 2, c. 16, s. 1, enacts "that no person, upon any contract, take directly or indirectly, for loan of any moneys, wares, &c. above the value of 5*l*. for the forbearance of 100*l*. for a year," and avoids all bonds and securities for such contract, and inflicts a penalty for entering into such contract. By the 3 & 4 Will. 4, c. 98, s. 7, all bills not having more than three months to run, were exempted from the provisions of the usury laws. The 7 Will. 4 & 1 Vict. c. 80, extended the exemption to all bills not having more than twelve months to run, and was to continue in force till the first of January, 1840. By the 2 & 3 Vict. c. 37, s. 1, it was provided that no bill or note not having more than twelve months to run, nor any contract for the loan or forbearance of money above 10*l*. shall, by reason of any interest agreed on, &c. nor shall the interest of any persons be affected by the laws for the prevention of usury, nor shall the parties be subject to penalties; with the proviso, that the enactment was not to extend to any loan or forbearance on the security of lands, tenements, or hereditaments, or any

Clack v. Sainsbury.

interest therein. This enactment has been continued by several statutes. The bill declared on in the present case, would have been bad under the statute of Anne, but is good under the statute 3 & 4 Will. 4, c. 98. The latter statute amounts to an unqualified repeal of the statute of Anne with respect to bills of exchange not having more than three months to run. The act 2 & 3 Vict. c. 37, cannot be taken as repealing the 3 & 4 Will. 4, but is only a qualified repeal of the statute of Anne. An affirmative statute, such as that of the 2 & 3 Vict., cannot repeal a former one unless it contains distinct language showing the intention to do so. If the cases under the 2 & 3 Vict. be cited on the other side, they are easily distinguishable. In the case of *Derry v. Toll*, 5 Exch. Rep. 741; s. c. 20 Law J. Rep. (N. S.) Exch. 33; s. c. 1 Eng. Rep. 440, it was held that in pleading usury it is sufficient to bring the matter within the statute of Anne, and the plaintiff must take advantage of the statute 2 & 3 Vict. c. 37, by way of replication. But the transaction in that case was protected only by the statute of Victoria. The Chief Baron said there, that the statute of Anne remains in force except as to the transactions mentioned in the statute of Victoria. The case of *Derry v. Toll* is founded upon *Washbourn v. Burrows*, 1 Ibid. 107; s. c. 16 Law J. Rep. (N. S.) Exch. 266. There the action was in covenant, on an indenture, and the plea alleged that the covenant was entered into in pursuance of an usurious contract for the payment of interest secured by a deed of bargain and sale of chattels and growing crops. The replication was, that the covenant was entered into after the 2 & 3 Vict. c. 37. It was held, that the plea was good, and that the replication should have been, that the contract was after the 2 & 3 Vict. c. 37, and that the security did not relate to land. The act of Victoria was held to repeal the statute of Anne in a qualified manner, and the Court thought it was sufficient for the defendant to show that the case was under the statute of Anne. But the present case is very different, as it depends upon the statute 3 & 4 Will. 4, c. 98, which amounts to an unqualified repeal of the former act as to bills not having more than three months to run. In *Follett v. Moore*, 4 Exch. Rep. 410; s. c. 19 Law J. Rep. (N. S.) Exch. 6, the point decided was, that the note in question was not a promissory note under the 3 & 4 Will. 4, c. 98, s. 7. A query was made in that case whether if the note had been within that statute it would have been protected, as the loan was further secured by a security on land. It is not necessary in the present case to argue that three months' bills involving a security on land, are still good notwithstanding the proviso in the act of Victoria. The allegation as to the security on land is one which ought to come from the other side — *Doe d. Haughton v. King*, 11 Mee. & W. 333; s. c. 12 Law J. Rep. (N. S.) Exch. 320.

[MAULE, J. If the statute of Victoria does away by absorption with the statute of William, then when usury is imputed under the statute of Anne, the person accused must confess and bring himself within the act of Victoria.]

But if the statute of Anne is repealed by that of Will. 4, the pleadings would be in this manner. The defendant would plead a plea

Clack v. Sainsbury.

under the statute of Anne. The plaintiff would reply under the 3 and 4 Will. 4, and then the defendant might rejoin under the provision of the 2 and 3 Vict. The effect of the statute of William was just as if the statute of Anne had applied to all contracts except on bills which had not three months to run. The case of *Berrington v. Collis*, 5 Bing. N. C. 332; s. c. 8 Law J. Rep. (N. S.) C. P. 175, will probably be cited on the other side. There a loan at more than 5l. per cent. on the security of the deposit of a lease, of a warrant of attorney and of a promissory note payable on demand, was held not to be protected under the 3 and 4 Will. 4, c. 98, s. 7. The question for the court in that case, raised on the affidavits, was whether the money was advanced on the deposit of the lease or on the note. In the last part of the judgment, it was said that the loan was not really made on the security of the promissory note, and that the discount taken made the note invalid, and the warrant of attorney also.

Montague Smith, contra. Whether the statute of 3 and 4 Will. 4, be repealed or not, the plea is good, and the replication is bad. It must be admitted that the plea is good under the statute of Anne. On a fair review of the statutes, it would appear that the act of Will. 4, is repealed by the statutes of Victoria, or, at all events, is suspended during their operation. The provision of the 3 and 4 Will. 4, does not repeal, but only makes an exception to the statute of Anne. Then the act of 7 Will. 4 and 1 Vict., which extends the exceptions to bills not having more than twelve months to run, and contains no proviso, absorbs and repeals the 3 and 4 Will. 4; and the act of 2 Vict. refers only to the statute of Anne and the 7 Will. 4 and 1 Vict. The legislature could not have intended that the acts should run together.

[MAULE, J. When three months' bills got a larger license than others, it was intended by the legislature to give currency to mercantile bills, which are generally drawn at two months from the date and not more than three. Had the enactment spoken in terms of "mercantile" bills, there would probably have been a dispute in every case whether the bill was mercantile or not. The legislature may afterwards have entertained a strong opinion that bills at longer date might be mercantile bills, and therefore provided that bills not having more than twelve months to run should be protected if there were no landed security. Supposing the statute of Will. 4 said, that all three months bills should be protected although there should also be security on land, and the statute of Victoria said, that all bills should be protected provided there were no security on land, could not the two enactments stand together?]

All the statutes passed since that of Anne coming by way of exception, the plea is sufficient, and it lies upon the plaintiff to bring the case within the exceptions. The issue which would have been raised by the plea would not have been whether there was a loan at more than 5l. per cent., but whether there was a corrupt agreement. If this was merely a loan on a note, then there was not a corrupt agreement, but if there was a security on land also, then the agreement was corrupt. *Berrington v. Collis*.

Clack v. Sainsbury.

[MAULE, J. It is contended then, for the defendant, that the plea does not set out the circumstances of the corrupt agreement, but that evidence might have been given of any corrupt agreement.]

The case of *Washbourn v. Burrows* shows that the plea here is good.

[JERVIS, C. J. But it is contended for the plaintiff that the statute of Anne does not exist at all as to three months' bills. In the case alluded to, which was on covenant, the plea was merely one of a corrupt agreement, and it was held that the replication should have shown that it was made after the statute of Victoria, and that there was no security on land. Here, if the plea be only one of a corrupt agreement, the replication that it was made after the statute of 3 and 4 Will. 4, and on a three months' bill is right.]

Phinn, in reply. The whole question in the case is, whether the statute of 3 and 4 Will. 4, is repealed or not. If it is not repealed, the plaintiff is entitled to judgment. Two affirmative statutes like that of Will. 4 and that of Victoria may well stand together. In *Foster's case*, 13 Rep. 63, *b.*, it was held, that where one statute imposed a penalty of 12*d.*, and afterwards another statute imposed a penalty of 20*l.* in respect of the same matter, the two statutes stood together, even though penal. It cannot be said that the statute of Victoria absorbed that of Will. 4, for had it been allowed to expire, the statute of Will. 4 must have been in force. As to the plea, the statement being that "it was corruptly agreed there, &c.," it must be taken as setting out the agreement.

[MAULE, J. The plea here is more in favor of the plaintiff than in *Derry v. Toll* or *Washbourne v. Burrows*, because both of those cases were within the statute of Victoria, which repeals the statute of Anne only *sub modo*. Here the statute of William is an absolute repeal of the statute of Anne, and therefore the plea is bad.]

If the plaintiff had traversed the corrupt agreement as suggested on the other side, the defendant would only have been put to prove his plea as laid. On the whole, therefore, it is submitted that the statute of William is still in existence, as if the statute of Victoria had never passed, and that the defendant has not brought the case within any statute now in force. The plaintiff is, therefore, entitled to judgment on the demurrer.

JERVIS, C. J. I am of opinion that the plaintiff is entitled to the judgment of the court. The action is brought on a bill of exchange at less than three months' date, and the defendant has pleaded in substance that the bill was given in pursuance of an agreement for securing more than 5*l.* per cent. on a loan. The replication alleges that the transaction, which took place after the passing of the 3 and 4 Will. 4, was a loan which was made on the security of a bill, and that the bill was payable at less than three months after date. The rejoinder states that the transaction took place after the statutes of Victoria had passed, and to that the plaintiff has demurred. The plaintiff contends that the operation of the statute of 3 and 4 Will.

Clack v. Sainsbury.

4, is not to qualify but to repeal the statute of Anne as to one class of bills, but on that point it is unnecessary to give an opinion, because the statute of William is a qualification of the statute of Anne, and an exemption of such bills as that in the present case, even though the statute of Anne be not *pro tanto* repealed. The question then arises, whether the case comes within the statute of Victoria, which extends the exemptions from the statute of Anne, subject to a certain proviso; and I am of opinion that the later statute does not absorb or get rid of the statute of William, and that the two are quite consistent. The legislature seems to have thought that the negotiation of bills at three months should be encouraged, and should therefore be exempt from the usury laws, and subsequently to have been of opinion that the exemption should be applicable to all bills not having more than twelve months to run, provided there was no security on land. I think that the qualification of the statute of Victoria is not applicable to the three months' bills under the 3 and 4 Will. 4. Then, as to the argument that the plea set up only a corrupt agreement, and that an agreement under or not under the statute of Anne might have been proved, it is clear that the replication that it was made after the act of Will. 4 would have been bad. But I do not think that is the right construction of the plea. I think this was an agreement for a loan, and that there should be more than 5*l*. per cent. interest, and that a bill at two months should be given for the sum. Immediately, then, that such an agreement is shown to have been made after the statute of William, that was a good answer to the plea.

MAULE, J. I agree that the statute of William is in full operation. The object of that statute was to enable bills of commercial character to circulate, although they were at a higher rate of interest than 5*l*. per cent.; as it was found that more might fairly be taken. For the reasons I have before stated, it would not have been sufficient to describe the bills as mercantile bills, and the legislature therefore confined the provision of the statute of William to bills such as would comprehend most mercantile transactions. The statute of Victoria took a step in advance as to the usury laws, and was not intended to restrict the exemption before made, but to allow more than 5*l*. per cent. to be taken upon all contracts not relating to land. Contracts of the nature of the present one, protected by the statute of William, were left as before, and it was not intended to deprive them of any protection which they had before under the statute of Will. 4. I do not think that statute is repealed, and it may well stand along with that of Victoria. Then, according to the defendant, the plea means that there was a corrupt agreement, and that the bills were given in pursuance of it. But that is not the meaning of the plea; it means that it was corruptly agreed that 37*l*. should be lent at more than 5*l*. per cent. interest, and that the bill should be given for this money. If it be said that the plea contains an implied averment that the agreement was made before the statute of William, the replication shows that it was after the statute of William, and is therefore

Grizewood v. Blane.

a good answer. Perhaps the plea is objectionable for not showing whether the agreement was before or after that statute. The state of facts then, upon the plea and replication is, that the agreement was made after the statute exempting from the usury laws bills which had not more than three months to run, and therefore the agreement has not that quality of corruptness imputed to it by the plea.

WILLIAMS, J. It is unnecessary to decide that the plaintiff is right to the full extent of the argument submitted on his behalf, and that the statute of Anne was *pro tanto* repealed by that of Will. 4. It is sufficient to say that the statute of Will. 4 is in full operation to qualify the statute of Anne, notwithstanding the statute of Victoria. If that be so, looking at the statements in the plea and the additional fact in the replication, that the transaction was after the statute of William, I think the transaction was not wrongful and illegal, but legal and innocent. I have assumed that the dates in the plea are not material and traversable, but it is not necessary to consider that question.

TALFOURD, J., concurred.

Judgment for the plaintiff.

GRIZEWOOD v. BLANE.¹

November 20, 1851.

Pleading — Gaming under 8 & 9 Vict. c. 109, s. 18 — Generality — Differences on Sale of Shares.

To a declaration for differences on the sale of railway shares, the defendant pleaded generally that the contract was by gaming, (under 8 & 9 Vict. c. 109, s. 18.)

On demurrer, the pleas were held bad for vicious generality.

ASSUMPSIT. The declaration stated that before the making of the agreement thereafter mentioned, to wit, on the 3d of August, 1850, the plaintiff, at the request of the defendant, bargained for and bought of the defendant, and the defendant then sold to the plaintiff divers, to wit, 450 shares, in divers railway companies, which said companies had been and were then established and incorporated under and by divers acts of parliament, at and under certain prices in that behalf, that is to say, ten shares in a certain company called, to wit, "The Great Western Railway Company," at 58*l.* 15*s.* for each and every of such shares; and also 100 shares in "The North Staffordshire Railway Company," at 6*l.* 7*s.* 6*d.* a share; 100 shares in "The London and Brighton Railway Company," at 40*l.* a share; and 240 old

¹ 21 Law J. Rep. (N. S.) C. P. 46.

shares in "The London and South-Eastern Railway Company," at 15*l.* 5*s.* a share; the aggregate amount of the purchase-money of the said several shares in the said companies amounting to a large sum of money, to wit, the sum of 8,885*l.*, and on the terms that all such several shares as aforesaid were to be delivered by the defendant to the plaintiff at a certain then future day and time, to wit, on the 13th of September then next following, and were to be then and on such delivery as aforesaid, accepted and paid for by the plaintiff. That the defendant was not, at the time of the aforesaid bargain and sale of the said shares, possessed thereof, or of any of them, and, for the purpose of delivering the same to the plaintiff, must have purchased or otherwise acquired the same on or before the said day appointed for their delivery as aforesaid. That during the said interval between the said bargain and sale and the aforesaid day and time so appointed for delivery of the said shares as aforesaid, the said shares rose in value in the public market thereof, and greatly increased in price, and were afterwards, and within a very short time of the day so appointed in that behalf for the delivery thereof, to wit, within two days of such appointed future time, to wit, the 11th of September, 1850, publicly bought and sold in the market thereof, at the respective enhanced and increased prices hereinafter mentioned, by reason whereof the defendant would have been unable to acquire the said shares by purchase thereof in the public market thereof so as to deliver the same on the said future day so appointed in that behalf as aforesaid, except by purchasing the same in such public market as aforesaid for delivery to the plaintiff at such enhanced and increased prices, which the defendant then well knew, and thereupon, in consideration of the premises, after such bargain and sale as aforesaid, and whilst the aforesaid contract in that behalf was open and incompletely perfected as aforesaid by the defendant, and before any breach of the said contract on either side, and before the said day so appointed for the delivery of the said shares as aforesaid, and before any delivery of any or either of them by the defendant to the plaintiff, and whilst the said shares bore in the market such increased and higher prices and value as aforesaid, to wit, on the 11th of September, 1850, it was agreed by and between the plaintiff and defendant, at the request of the defendant, that the plaintiff should not call upon or require the defendant, or in any way should hold him liable to deliver the said shares or any of them, to the plaintiff on the said future day so appointed as aforesaid in that behalf, and that the defendant should not call upon or require the plaintiff, or in any way hold him liable at any time to pay for the same to the defendant the aforesaid purchase-money, or any part thereof, and that the aforesaid contract of bargain and sale of the said shares should be wholly rescinded, annulled, and made void as between the plaintiff and the defendant, so far as related to the said delivery of the said shares, and that instead thereof the plaintiff should sell to the defendant and the defendant buy of and from the plaintiff an equivalent number of the said several shares in the said several companies aforesaid respectively, at the then market price of such shares as were contained in the said contract of bargain

Grisewood v. Blane.

and sale as aforesaid, such market prices then being the increased and enhanced prices hereinafter mentioned, that is to say, the said ten shares in the Great Western Railway Company at 67*l.*, the said 100 shares in the London and Brighton Railway Company at 42*l.*, and the said 240 shares in the London and South-Eastern Railway Company at 18*l.* 7*s.* 6*d.*, the aggregate amount of such enhanced and increased prices of the said several shares being and amounting to the sum of 9,992*l.* 10*s.*; such last-mentioned sum of money being a much larger sum than the first-mentioned purchase-money and prices thereof, and that the defendant should pay to the plaintiff the difference between the two aforesaid amounts of the purchase-money of the said several sets of shares, such difference being and amounting to a certain sum of money, to wit, the sum of 1,107*l.* 10*s.*, within a reasonable time in that behalf, after the making and entering into the last-mentioned agreement, and that neither of the said shares, nor any of them in the said first-mentioned contract specified, should be actually delivered by the defendant to the plaintiff, nor the said shares, nor any of them in the last-mentioned contract specified, should be actually delivered by the plaintiff to the defendant, but that the said two sets of shares should be set off against each other so far as related to the actual delivery thereof respectively, by the respective parties to the said contract, and thereupon, afterwards, to wit, on the same 11th of September, 1850, in consideration of the premises, and that the plaintiff, at the request of the defendant, then promised the defendant to perform and fulfil the last-mentioned agreement on his part and behalf, the defendant then promised the plaintiff to perform and fulfil the same on his part and behalf, and to pay to the plaintiff the said difference of 1,107*l.* 10*s.* as aforesaid; and the plaintiff avers that although he, confiding in the said promise of the defendant, in compliance with the said agreement, did not at any time afterwards call upon or require the defendant to deliver to the plaintiff the said shares in the said contract firstly above mentioned, or any of them, nor hath the plaintiff since held, nor doth he hold the defendant liable to deliver the same, or any of them, to the plaintiff on the said future day so appointed in that behalf as aforesaid, or at any other time, and although the first-mentioned contract of bargain and sale, so far as related to the delivery of the said shares on the said future day, and the payment of the price thereof, was then and is wholly rescinded, annulled, and made void, as between the plaintiff and the defendant so far as relates to the said delivery of the said first-mentioned shares; and although instead thereof the plaintiff did afterwards, to wit, on the 11th of September, 1850, in further compliance with the said last-mentioned agreement, sell to the defendant the said several shares lastly above mentioned, and the defendant then bought the same of and from the plaintiff at such last-mentioned enhanced and increased market prices as aforesaid, and on the terms aforesaid, and although the plaintiff in all respects hath always performed and fulfilled the said last-mentioned agreement on his part and behalf to be performed and fulfilled, and although a reasonable time in that behalf for the payment of the aforesaid difference between the two aforesaid

amounts of the purchase-moneys of the said several sets of shares, such difference amounting, to wit, to the said sum of 1,107*l.* 10*s.* had elapsed before the commencement of this suit, and although the plaintiff hath always, from the making and entering into the last-mentioned agreement, been ready and willing to accept such difference and to close and finally settle the aforesaid transaction and dealing in the said shares as aforesaid, whereof the defendant during all the time aforesaid had notice, yet the defendant did not nor would pay to the plaintiff the said difference, &c.

There was also an *indebitatus* count for the price of shares bargained and sold, and sold and delivered, for money paid, money had and received, and an account stated.

Pleas — Second, as to the first count, that the alleged contract was and is a contract made by and between the plaintiff and the defendant, by way of gaming, contrary to the form of the statute then and still in force in such case made and provided, and that it was made after the year 1847. Verification.

Fourth, to the first count, that the alleged contract was and is a contract by way of gaming, &c. Verification.

Seventh, to the first count, that the alleged selling by the plaintiff to the defendant of the shares, and the buying of them by the defendant, was a contract by way of gaming, &c. Verification.

Eighth, to the last count, that the shares and interest therein mentioned, were respectively bargained and sold, and sold and delivered, and the said money was paid and had and received, and the said account stated, by way of gaming and wagering, contrary, &c.

Special demurrer.

Pearson, in support of the demurrer. It will be said, on the other side, that the declaration and pleas taken together sufficiently show that the transaction was by way of gaming, and void under the 8 & 9 Vict. c. 109, s. 18. But it is submitted, for the plaintiff, that the declaration is good and shows no illegality on the face of it, and that the pleas are bad for not showing how the transactions were of a gaming character. The declaration sets out two contracts. These contracts are not void in law. *Hibblewhite v. M^r Morine*, 5 Mee. & W. 462; s. c. 8 Law J. Rep. (N. S.) Exch. 271, it was held that a contract for the sale of goods, to be delivered on a future day, is not bad because the vendor had not the goods in his possession, and had no reasonable expectation of being possessed of them by the day, otherwise than by purchasing them after the contract. The Stock-Jobbing Act of 7 Geo. 2, c. 8, does not apply here, being applicable only to securities existing when it was passed. The pleas in this case follow the words of the 8 & 9 Vict. c. 109, s. 18, which enacts, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." But the pleas are no further good than other general pleas of illegality. Pleas of that kind should state the particulars of the illegality. In *Hill v. Montagu*, 2 M. & S. 377, a general plea of usury was held bad on general demurrer, Lord Ellenborough remarking that pleas of fraud and covin

Grizewood v. Blane.

were the only exceptions to the rule requiring particularity. The test as to variance between the statements in a plea of illegality and the proof, is laid down in 1 Wms. Saund. 295, *a* and *b*.

[MAULE, J. The rule is, that if you want to set up the defence of illegality, you must show it, by proper pleading. It does not say by what pleading.]

Wherever gaming has been pleaded as a defence, it has been done with particularity. *Allport v. Null*, 1 Com. B. Rep. 974; s. c. 14 Law J. Rep. (n. s.) C. P. 272; *Cooke v. Stratford*, 13 Mee. & W. 379; s. c. 14 Law J. Rep. (n. s.) Exch. 66. In the latter case, a plea was amended by substituting the game of "hazard" for "*vingt-et-un*." There could have been no necessity for the amendment if a general plea had been sufficient; yet the court considered the propriety of the amendment after verdict.

[MAULE, J. That was under the statute of Anne, in which the illegal games are specifically named.]

Temple v. Keily, 1 Man. & G. 904; *Slegg v. Phillipps*, 4 Ad. & E. 852; s. c. 5 Law J. Rep. (n. s.) K. B. 156; and *Ransford v. Copeland*, 6 Ad. & E. 482; s. c. 6 Law J. Rep. (n. s.) K. B. 170, afford illustrations of the same doctrine. In the last-mentioned case, where the plea was, that a company was "illegally" associated contrary to the privileges of the Bank of England, Lord Denman remarked, "There is certainly great inconvenience in this general use of the word 'illegally,' because, if considered as involving some fact which is to be the subject of proof, the defendant may avail himself of any fact which would render the business illegal."

Bovill, contrà. The pleas are good. There could be no difficulty replying to them. The declaration sets out a contract which on the face of it may be legal or illegal. The plea can only set up the same contract, but adding that it was illegal. It is true that the illegality must be specially pleaded, and that the plea must give color. Therefore, the defendant does not deny the contract, but says that it is illegal.

[JERVIS, C. J. You do not say that the contract appears on the declaration to be a gaming one; but in addition to what is in the declaration you say something else, namely, that the contract was by way of gaming.]

None of the cases go so far as to show that under this act it is necessary to set out the particulars. The language of the Usury Act and Gaming Act of 9 Anne and 16 Geo. 2, is different from that of the statute of Victoria, and made it necessary to specify the particulars of the transaction.

[MAULE, J. The difficulty of pleading a special plea here is, that it would amount to the general issue.

WILLIAMS, J. Is it quite clear that it would not be a good plea to say that the contract was colorable and by way of gaming?

MAULE, J. That might be a good plea although amounting to the general issue.]

Wickens v. Goatley.

Pearson, in reply, was stopped by the court.¹

JERVIS, C. J. It is said that the defendant, by these pleas, does not intend to vary the declaration at all, but that the declaration may mean one thing or the other. Then his pleas put a legal construction on the declaration. Though he admits the declaration does not show that the contract was a gaming one, he says that he will put the gaming on the record. But if it was wished to show gaming, the defendant ought to have pleaded the matter, in order that the plaintiff might have had an opportunity of traversing it. I, therefore, think the judgment ought to be for the plaintiff.

MAULE, J. I think myself that the contract stated in the declaration is not a gaming contract. Then the allegation in the pleas, that it was by way of gaming, is an allegation of matter of law contradicting the declaration. To plead this defence it is not sufficient to follow the language of the statute. The same objection as to particularity arises here as in other cases of illegality. The general convenience requires that the defence should not be by an unexplanatory allegation; but that matter of fact should be pleaded to show the court that the contract was a gaming one.

WILLIAMS, J. I am of the same opinion. If we were to allow these pleas, we should be neglecting the rule, which is the foundation of all the rules of pleading, that the one party should let the other know what he is to rely upon at the trial. Now, it is said that the object of the pleas was to show that the contract of sale was colorable and by way of gaming. But if the defendant wishes, it is open for him, on those pleadings, to take the case of *Hibblewhite v. M' Morine* into a court of error.

TALFOURD, J. I am of the same opinion. I think that the pleas are bad for vicious generality. *Judgment for the plaintiff.*

WICKENS v. GOATLEY.²

November 8, 1851.

Insolvency — 1 & 2 Vict. c. 110 — *Petition* — *Contents* — *Pleading* — *Generality* — *Jurisdiction*.

A replication to a plea of set-off alleged that the defendant being in custody within the walls of the Queen's Prison at the suit of B, applied according to the provisions of the 1 & 2 Vict.

¹ The further question was discussed, whether the pleas were not bad for not negating the provisos in the 18th section of the act; but on that point no opinion was given by the court.

² 21 Law J. Rep. (N. S.) C. P. 50; 15 Jur. 1198.

Wickens v. Goatley.

c. 110, to the Insolvent Court, stating in his petition that he was willing his personal estate should be vested in the official assignee; and that an order was made accordingly:—

Held, that the replication was good. That it is sufficient in such a pleading to say, that the proceedings were according to the act, without showing that the petition stated all the requisites of the 35th section. That the court will take judicial notice that the Queen's Prison is in England. And that it was not necessary to allege in the replication on what process the defendant was in custody.

Quere, whether it is necessary that a petition to the Insolvent Court should aver all the particulars mentioned in the 35th section of the act in order to give the court jurisdiction.

ASSUMPSIT on two promissory notes and on the money counts.

Plea. Set-off.

Replication. That the defendant being in custody within the walls of a certain prison, to wit, the Queen's Prison, at the suit of B. for debt, &c., duly and according to the provisions of the act, 1 & 2 Vict. c. 110, applied by petition in a summary way to the court for the relief of Insolvent Debtors, and stated in his petition that he was willing that his personal estate should be vested in the provisional assignees according to the provisions of the said act, which said petition was duly subscribed by the defendant, and was filed of record in the said court pursuant to the directions of the said statute; and the said court, in pursuance and according to the said statute, ordered that all the estate, &c., should be vested in the provisional assignee; and by virtue of the said statute, the debts and causes of set-off became vested in the provisional assignee.

Special demurrer.

J. Brown, for the demurrer. The replication is bad. In the first place, it is bad for not sufficiently showing that the Insolvent Court had jurisdiction. It does not show that the defendant at the time of presenting his petition under the Insolvent Act was a prisoner in custody within the walls of a prison in England. The name of the prison is laid under a *videlicet*, and it may not have been a prison in England, in which case the Insolvent Court would have had no jurisdiction.

[JERVIS, C. J. The Queen's Prison is the prison of this court, and this court will take notice that it is in England.]

The replication is also insufficient inasmuch as it does not show on what process the defendant was in custody. It might have been on such process as outlawry or extent, in which case the Insolvent Court would have had no right to interfere.

[JERVIS, C. J. Why should we make such a supposition? I think the allegation is sufficient.]

Lastly, the replication ought to have shown that the petition stated all those particulars which under the 35th section of the act are essential to give the court jurisdiction. In *Christie v. Unwin*, 11 Ad. & E. 753; s. c. 9 Law J. Rep. (N. S.) Q. B. 47, the principle was laid down that an order made in Bankruptcy by the Lord Chancellor under the 6 Geo. 4, c. 16, s. 18, must show on the face of it enough to give jurisdiction. There a creditor applied to have his debt substituted for that of the petitioning creditor, and it was held that as a creditor so applying must show that he had a sufficient debt before making the

Wickens v. Goatley.

application, it was not enough to show that the application had been made by persons who were creditors of the bankrupt. The doctrine laid down in *Peacock v. Bell*, 1 Wms. Saund. 74, is, that nothing shall be intended to be out of the jurisdiction of a superior, or within the jurisdiction of an inferior court. The cases of *Everard v. Paterson*, 6 Taunt. 645, and *Williams v. Germaine*, 7 B. & C. 468; s. c. 6 Law J. Rep. K. B. 90, recognize the same principle.

T. Jones, contra, was stopped as to the first two objections. The replication is sufficiently certain. It appears on the face of it that the court had jurisdiction, for it avers that the provisions of the act were complied with, and it was unnecessary, under the rule against prolixity, to state all the proceedings. The point has been substantially decided in the case of *Nicol v. Orgill*, 12 Jur. 34, where it was objected that a plea of the plaintiff's insolvency did not show that he had applied to the court by petition within fourteen days of the commencement of his custody, and did not state the contents of the petition, and it was held that the plea was good. The cases of *Tucker v. Webster*, 10 Mee. & W. 371; s. c. 12 Law J. Rep. (n. s.) Exch. 49, and *Sayer v. Dufaur*, 5 Dowl. & L. P. C. 313; s. c. 17 Law J. Rep. (n. s.) Q. B. 50, are also in point.

J. Brown, in reply.

JERVIS, C. J. I am of opinion that the replication is sufficient. Two of the objections taken to it were dismissed in the course of the argument, the court taking judicial notice that the Queen's Prison is in England, and thinking that the allegation as to the custody of the prisoner was sufficient. As to the remaining objection, the case of *Nicol v. Orgill*, as far as it goes, is in point. Although the decision of Pattenon, J., in that case is not specifically in point, the same objection was taken as here, namely, that the requisitions to found the jurisdiction of the insolvent court were not stated, and the plea was held to be sufficient. The pleader took upon himself to allege that the petition did contain enough to show that the court had jurisdiction. I apprehend that it is enough to state that the proceedings were under the statute. I think it is sufficient that the plea does show that the petition was framed in pursuance of and according to the act.

WILLIAMS, J. I am of the same opinion. I think that the rules of pleading are satisfied by the allegation that the plaintiff applied to the court according to the provisions of the act; and being of that opinion, it is unnecessary for me to decide whether it be a condition precedent to the jurisdiction of the court that the petition should contain a statement of compliance with all the particulars mentioned in the act. It would be very inconvenient to hold such a proposition to be good law, since if the petition neglected to set out any one particular, the whole proceedings of the Insolvent Court would be a nullity.

Nicholl v. Chambers.

TALFOURD, J. I am of the same opinion. I think the allegations are substantially the same as those in *Nicol v. Orgill*.

Judgment for the plaintiff.

NICHOLL v. CHAMBERS.¹

January 23, 1852.

Vendor and Purchaser — Conditions of Sale — Description of Parcels — Identity — Quantity.

A contract of sale described the property purchased as "The cottage and paddock comprising 1 a. 2 r. 8 p. situate at, &c., described in the particulars as lot 1." The description of lot 1, in the particulars was, "The property comprises 1 a. 2 r. 8 p. situate, &c., consisting of a cottage and paddock in the occupation of Mr. P." By the contract of sale, the title and conveyance were to be completed according to the conditions of sale. One of these was, "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated whether more or less (although the title-deeds state such quantity to be less) without any compensation on either side. And no other evidence of identity shall be required than that furnished by the title-deeds, and the statements therein shall be deemed conclusive evidence of the identity of the property." On default of completion the deposit-money was to be forfeited. The vendor delivered an abstract of title to 3 r. 22 p. only:—

Held, that the mere fact of a title to land described as consisting of 3 r. 22 p. being made by the vendor, did not, under the circumstances, authorize the purchaser to contend that the title had not been made according to the conditions of sale, and that he was bound to complete.

THIS was a feigned issue directed under an interpleader order, in an action of *Chambers v. Winstanley*, by Williams, J., to try whether the plaintiff in the issue was entitled, as against the defendant in the issue, to a sum of 90*l.* in the hands of Winstanley, an auctioneer.

At the trial, before Alderson, B., at the Summer Assizes, at Croydon, in 1851, it appeared that the sum in question was the deposit paid by the defendant in respect of a purchase by him at a public auction, of a property alleged to belong to the plaintiff, which purchase he refused to complete; and the question was whether the plaintiff was entitled to treat the deposit as forfeited. The auction took place on the 3rd of July, 1850, and the property then purchased by the defendant was described in the contract of sale as "The freehold cottage and copyhold paddock comprising 1 a. 2 r. 8 p. situate at Chase Hill, near Southgate, described in the particulars attached hereto as lot 1." The description of lot 1, in the particulars was, "The property is freehold (except the paddock which is copyhold) and comprises 1 a. 2 r. 8 p. situate near Southgate two miles from Enfield, consisting of a cottage, yard, kitchen-garden, and paddock. In the occupation of Mr. Page." The contract of sale contained a clause that the title and conveyance should be completed according to the conditions of sale. The sixth condition of sale was in these words:

¹ 21 Law J. Rep. (N. S.) C. P. 54.

Nicholl v. Chambers.

"The several properties comprised in the foregoing particulars are presumed to be correctly described, and the quantities of the land shall be taken as stated, whether more or less, (although the title-deeds and court rolls state such quantities to be less,) without any equivalent or compensation on either side. And no other evidence of identity shall be required than that furnished by the documents of title. And the statements contained therein shall be deemed conclusive evidence of the identity of the properties respectively." The seventh condition was: "If either of the purchasers shall fail or neglect to comply with any of the above conditions (one of which was that the purchase should be completed within a time which had elapsed when the first action was brought,) his deposit money shall be forfeited." The abstract of title forwarded to the defendant described the property to which it referred as consisting of 3 r. 22 p. It was contended, by the defendant's counsel, that under these circumstances the defendant was not bound to complete the purchase, and that he had not forfeited his deposit. The learned judge directed a verdict for the plaintiff, giving the defendant leave to enter a verdict upon this and upon other points reserved.

Peacock had obtained a rule *nisi* to enter a verdict upon the ground that the identity of the property contained in the abstract of title with the property mentioned in the particulars was not sufficiently proved, and that the plaintiff had failed to make a title, (the rule upon the other points reserved being refused.)

Shee, Serjt., and *Lydekker* (January 23,) showed cause. The only ground upon which this rule was granted was, that owing to the difference in quantity between the particulars and the abstract, the identity of the property was not made out. No evidence was given that, in point of fact, the property mentioned in the abstract does not consist of 1 a. 2 r. 8 p., but it was said that the discrepancy between the particulars and the abstract showed that the plaintiff had not made a good title to the whole of the property, and that he therefore, and not the defendant, was in default. But the sixth condition is an answer to this argument; for it expressly provides for the case which has occurred: it stipulates "That the quantities of the land shall be taken as stated, whether more or less, (although the title-deeds state such quantities to be less,) without any equivalent or compensation on either side. And no other evidence of identity shall be required than that furnished by the documents of title, and the statements contained therein shall be deemed conclusive evidence of the identity of the properties." Unless, therefore, it can be said, that an abstract of title referring to a property as containing 3 r. 22 p. cannot apply to a property consisting of 1 a. 2 r. 8 p. the sixth condition of sale meets the case, and the plaintiff is entitled to recover, upon the non-completion of the purchase by the defendant.

Byles, Serjt., and *Garth*, contra. It is assumed, on the other side, that the premises mentioned in the particulars and those contained in

the abstract correspond; but there is no evidence of this. The sixth condition of sale does not help the plaintiff. It mentions the quantities of the land and the documents of title. What land? what documents of title? It only means that the documents of title shall be conclusive evidence of the identity, if they afford any evidence at all. But they furnish none.

[MAULE, J. The question is, what is the description in the particulars? He does not sell a piece of land by measure, but he sells a particular piece, which the defendant might go and see; the cottage and land in the occupation of Mr. Page. He says it is 1 a. 2 r. 8 p. in the contract of sale; if it turned out somewhat less it would not signify, but there is nothing to show that the premises described in the particulars contained a bit more or less than the quantities mentioned in the title deeds.]

In *Flower v. Hartopp*, 6 Beav. 476; s. c. 12 Law J. Rep. (N. S.) Chanc. 39, there was a similar condition of sale; yet, under circumstances somewhat like the present further evidence of identity was required. The Master of the Rolls there said "The instant you have a variation in the deeds, the description in the deeds cannot of itself be evidence of the description contained in the particulars, something else must be introduced to correct them. And, therefore, although the purchaser may not be entitled to require any further evidence of the identity of the parcels than what is afforded by the deeds, yet he is entitled to have what he has bought distinguished, and without that it cannot be said by the vendor that he has proved by the instruments the parcels described in the particulars."

[MAULE, J. In that case there was a description in the deeds which was not applicable to the land as described in the particulars. No doubt, if land is described in a will as old pasture-land, and the particulars state arable land, the language of the deeds could not in that case comprehend the land described in the particulars without some further explanation. But in this case there is nothing which amounts to a description of the quantity at all.]

They cited Sugd. Vend. and Purch. 11th ed. p. 396, and *Portman v. Mill*, 2 Russ. 571.

[JERVIS, C. J. In that case the vendor professed to give *about* the quantity. Here he professes not to give any quantity.]

Price v. North, 2 You. & C. 620; s. c. 7 Law J. Rep. (N. S.) Exch. Eq. 9, and *Flight v. Booth*, 1 Bing. N. C. 370; s. c. 4 Law J. Rep. (N. S.) C. P. 66, were also cited.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. The sixth condition gives distinct notice to the purchaser that the title-deeds might show a less quantity than that stated in the particulars, and that the vendor will not be bound to the exact quantity; and that no further evidence of identity must be required. It amounts to this: he says "I will sell you this particular property. The title deeds may show a property described as less in quantity, but you must take it, without further proof that it is the same property." I think the purchaser cannot get rid of this condition by requiring the

Parker v. The Great Western Railway Company.

plaintiff to show a title to the same quantity as that mentioned in the particulars.

MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

PARKER v. THE GREAT WESTERN RAILWAY COMPANY.¹

November 12, 14, 1851.

Railway — Carriers — Charges — Loading — Inequality — Allowance — Money had and received — Scale-bill — Classification of Goods — Small Parcels — Charge for Conveyance — Goods of like Nature.

By 5 & 6 Will. 4, c. 107, the defendants were incorporated for the purpose of making and working the Great Western Railway.

By s. 163, all persons were empowered to use the railway, with proper carriages, upon payment of such rates and tolls as the act authorized to be taken.

By s. 164, tolls, none of which exceeded 3d. per ton per mile, were allowed to be taken by the company for tonnage of articles to be conveyed on the railway.

By s. 166, the company were empowered to provide power for drawing articles on the railway, and to receive such sums for the use of such power as they should think proper, in addition to the other rates, tolls, or sums by the act authorized.

By s. 167, the company were authorized to use locomotive or other power, and in carriages drawn thereby to convey goods, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls by the act authorized.

By s. 171, the company were empowered to make such orders for fixing a sum to be charged in respect of small parcels not exceeding five cwt. as to them should seem proper; "provided that the said provision shall not extend to articles sent in large aggregate quantities, though made up of separate parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of the like nature which may be sent at the same time.

By s. 175, it was provided, that the rates and tolls to be taken by virtue of that act should be charged equally and after the same rate per ton per mile in respect of the same description of articles, and that no reduction or advance in the same should either directly or indirectly be made, partially, or in favor of or against any particular person; but that every such reduction or advance should extend to all persons using the railway or carrying the same description of articles thereon.

By 1 & 2 Vict. c. 92, s. 44, the company were empowered to receive a reasonable charge for the loading and unloading or weighing any articles which they might be required to load, unload, or weigh.

By 7 & 8 Vict. c. 3, s. 50, the company were empowered, whenever they should act as carriers or provide locomotive power or carriages for the conveyance of goods, to charge for such power and carriages such sum (not exceeding the sums, if any, limited by former acts) as they should think expedient. Provided that such charges should be made equally to all persons in respect of all articles of a like description and conveyed in a like carriage over the same portion of the railway and under the like circumstances, and no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favor of or against any particular person.

The plaintiff, a carrier, sought to recover, in an action for money had and received, the

¹ 21 Law J. Rep. (N. S.) C. P. 57.

Parker v. The Great Western Railway Company.

amount of sums alleged to have been overcharged by the defendants for carriage of goods by their railway.

1. In addition to the rates fixed by the company for the carriage of goods by their scale-bills, they charged the plaintiff a sum for "loading, unloading, covering, and risk of stowage." The plaintiff never required the company to load or unload:—

Held, that the rate fixed for "conveyance," where the company acted as carriers under s. 167 of 5 & 6 Will. 4, c. 107, included the above charges; and that s. 44 of 1 & 2 Vict. c. 92, did not apply to the case where the company acted as carriers in conveying the goods of other persons, but only to cases in which they did not act as carriers, but performed the duty of loading and unloading for other persons carrying goods, being requested by them to perform it.

2. Up to a certain time the company had made an allowance of 10l. per cent. to the plaintiff and other carriers for requiring them to sign certain ticking-off notes and declarations whenever they delivered goods to be carried by the company. In order to make these, some trouble was required in weighing and classifying the goods. The allowance was discontinued after the decision in *Parker v. The Great Western Railway Company*. The same notes were not required from persons not being carriers:—

Held, that the requiring such additional matter from carriers without allowance, did not entitle them to an action for money had and received, as for an overcharge to them, as compared with the rest of the public, in violation of the 5 & 6 Will. 4, c. 107, s. 175; but that it was the subject of an action for damages for any injury sustained in consequence.

3. The plaintiff and other carriers were in the habit of making charges for booking parcels. The company entered into an agreement with E. S. to convey goods to and from their station for 1000l., and to relinquish booking-fees, which he did:—

Held, that, assuming the practice of booking without fees to be continued by E. S., this was no violation of the proviso in s. 175, the plaintiff not being bound to charge any thing for booking, but doing it merely for his own benefit.

4. The company charged the plaintiff and other carriers 50 per cent. more for "packed parcels" than they charged the public in general:—

Held, that this was a violation of the proviso in the 5 & 6 Will. 4, c. 107, s. 175, and in the 7 & 8 Vict. c. 3, s. 50, and that the plaintiff was entitled to recover back the sums so paid.

5. The company, by a scale-bill, in force up to June, announced that on miscellaneous goods, not being aggregate of one "kind or class," they would charge 2d. extra:—

Held, that, by having used the words "kind" and "class" as synonymous, they were bound by their own definition, and could not charge goods of the same class in their scale-bill as goods unconnected with goods of a like nature, within the meaning of the proviso in s. 171 of the 5 & 6 Will. 4, c. 107.

By a subsequent scale-bill the goods were divided into "classes" without any miscellaneous class, and it was announced that a parcel-rate would be charged on all parcels under one cwt. When several parcels in one lot of goods of the same class but of different kinds, each separately being under one cwt., but in the aggregate above one cwt., were directed to one consignee (as was generally the case where the company carried them for the public,) the company charged tonnage-rate on such lot of parcels; but when a similar lot of parcels was delivered by carriers, directed to different consignees, the company charged each separate parcel at the parcel-rate:—

Held, an unequal mode of charging within s. 50 of the 7 & 8 Vict. c. 3, and that the fact of being directed to the same or different consignees does not prevent goods from being goods carried "under the same circumstances" within that section.

The mere division of goods into "classes" in the scale-bill would not enable the plaintiff to treat all the goods in a particular class as goods "of a like nature," within s. 171 of the 5 & 6 Will. 4, c. 107, or as goods of a "like description" within s. 50 of the 7 & 8 Vict. c. 3, (post, 8th head.)

6. *Held*, that where several parcels of goods of the same kind were sent together and amounted to a greater weight than five cwt., (or the weight fixed upon by the company as the dividing point between the tonnage and parcels rates,) they could not be charged an additional sum as "miscellaneous goods," or at the parcel-rate within s. 171 of the 5 & 6 Will. 4, c. 107.

7. *Held*, that in addition to the toll of 3l. per cent. which the company were empowered to take by s. 164 of the 5 & 6 Will. 4, c. 107, for tonnage, they were also entitled by s. 167 to

Parker v. The Great Western Railway Company.

charge a reasonable sum for "conveyance" of goods as carriers, including loading, unloading, risk, &c., and were not restricted to "such sum as they should think expedient for locomotive power and carriages," within s. 50 of the 7 & 8 Vict. c. 3, (assuming that to be the true construction of the last-mentioned section.)

8. *Held*, that according to the proper construction of the 5 & 6 Will. 4, c. 107, s. 171, where several small parcels of a like nature, being altogether less than one cwt., (the scale-bill fixing that as the limit,) were delivered in one lot directed to different consignees, the company were entitled to charge them as one "small parcel" within that section at the parcel-rate; and where such several small parcels were not of a like nature, though in the same "class" in the scale-bill, the company were entitled to charge each of them as a separate parcel at the parcel-rate.

ASSUMPSIT for money had and received by the defendants to the plaintiff's use.

Plea — Non assumpsit. Issue thereon.

The particulars of demand stated that the action was brought to recover a sum for overcharges made by the defendants and paid to them by the plaintiff, for the carriage of goods on their railways between the 10th of January and the 13th of September, 1848, inclusive.

At the trial, a verdict was found for the plaintiff, damages 5000*l.*, subject to a reference to an arbitrator, to whom the cause and "all matters in difference between the parties relative to the charges made by the defendants upon the plaintiff, and to payments made by him" to them, were thereby referred; and it was ordered, "that the arbitrator should state the facts upon his award, which should be brought before the court on a special case, with the view of the opinion of the court being taken on the right of the defendants to enforce the payments which the plaintiff had made in respect of certain items, of which notice was given to the defendants, and also upon the right of the plaintiff to recover *in the said action* in respect of such items." The order of reference also contained a power to refer the case back to the arbitrator to assess what might be due to the plaintiff upon the principles laid down in the judgment of the court. The arbitrator stated the following facts: —

Case. The plaintiff was a common carrier, having his principal place of business at the New Inn, London, and was in the habit of carrying goods for hire from thence to places in the west of England, employing for that purpose the defendants, as common carriers, to convey goods on their railways so far as was convenient to him, and performing the part of the journey to and from the company's stations by his own agents. All the goods mentioned in the case were delivered by the plaintiff to the company at one of the stations, and carried by them and received by him from them also, at one of their stations, and were goods which he was employed by his customers to carry as a common carrier. The defendants, incorporated by 5 & 6 Will. 4, c. 107, were common carriers of passengers, goods, and cattle on their railways from and to the various stations from and to which the plaintiff so sent goods, and have carried goods in the same manner for other carriers besides the plaintiff, and also have carried goods sent to them for carriage by persons not carriers by trade; and have delivered such goods to the consignees at their addresses, making

Parker v. The Great Western Railway Company.

additional charges for such delivery. They have also found and conducted the carriages, tracks, and engines used on the railway for the carriage of passengers and goods. The persons who act as common carriers have for some years found it necessary for their business to employ the company to carry for them on their railways. On the 1st of January, 1848, the company issued a printed scale-bill marked A, which continued in force until the 15th of June, when another scale-bill marked B was issued, which was replaced by another (C) on the 17th of July. All these scale-bills were acted upon by the company during the time they were in force. (The material parts of the scale-bills are mentioned under the different heads of claim to which they apply.)

All the payments which are sought to be recovered back were made by the plaintiff under protest, and in order to prevent the loss of his business as a carrier.

The first claim is to recover back from the defendants the amount, paid by the plaintiff to them, of certain charges made in addition to their carriage-rates between the 15th of June, 1848, and the 17th of July, 1848, for "loading, unloading, and risk of stowage," and from the 17th of July, 1848, to the 1st of May, 1851, when the scale-bill was again altered for the "loading, unloading, and covering" of goods.

By the 1 Vict. c. 92, s. 44, the defendants are empowered from time to time, and at all times thereafter, to demand, receive, and recover, a reasonable charge for the loading and unloading, or weighing any articles, matters, or things which they may be required to load, unload, or weigh. No such charges as those in question were made until the 15th of June, 1848, when the scale-bill was published. That scale-bill contained the following notification of charge:—"Notice. In addition to the parcel and tonnage rate, the company will make a charge by parcel or weight on every parcel or lot of goods, except the undermentioned, for the loading, unloading, and risk of stowage of the same, the particulars of which can be obtained at any of the railway stations." That scale-bill continued in force from the 15th of June until the 17th of July, 1848, when the bill C was published. The bill C contains the following notice:—"In addition to the parcel and tonnage rate, the company will make a charge by parcel or weight on every parcel or lot of goods, except the undermentioned, for the *loading, unloading, and covering* of the same, the particulars of which can be obtained at any of the railway stations." At the bottom of the particulars of additional charges referred to in the scale-bills, the additional charge on the enumerated articles was given.

The course of business has been, for the plaintiff's men to bring the goods to be carried on the railways to the company's stations in his wagons, and to deliver them to the company on the platform, and for the company to carry them across the platform and load them on the trucks; and goods which had been carried by the company were unloaded out of the trucks by them, carried by them across the platform, and there delivered to the plaintiff's servants, who loaded

Parker v. The Great Western Railway Company.

them into his wagons, and took them away. The goods were weighed by the plaintiff before they were brought to the station of the company, and generally were not weighed by the company. The company were not required by the plaintiff to load, unload, or weigh the goods.

The additional charges are unreasonable.

The questions for the opinion of the court on this head of claim were, first, whether the plaintiff was entitled to recover from the defendants the whole of the sums paid by him to them as aforesaid for the charges for loading and unloading, and risk of stowage, or for loading, unloading, and covering; and if not, secondly, whether he was entitled to recover any, and, if any, what part of such sums.

The second claim is for an allowance of 10*l.* per cent. on the moneys paid by the plaintiff to the company, in order to have his goods carried or delivered by the company; and is claimed in respect of the performance by him of matters which the company required to be done by him and other carriers, and not by the rest of the public.

The company have for some years required the plaintiff and other carriers, whenever they brought goods to them for carriage on the railway, to fill up, sign, and deliver to the company's clerk before the goods were received for carriage, a declaration and ticking-off note. In order to fill up these printed forms as required, it is necessary for the carriers' servants to weigh and classify the goods before bringing them to the station. The plaintiff, on every occasion when the company carried goods for him on the railway, was required to, and did, weigh and classify them, and made out, filled up, and signed such declaration and ticking-off note, and delivered it to the company's clerk before the goods were carried. At the bottom of the ticking-off note was the following: "Carriers' goods not accompanied by this declaration and ticking-off note, properly filled up and signed by the consignor, will not be received for transmission." The forms of these declarations and ticking-off notes are furnished by the company to the carriers. When persons not carriers brought goods to the station to be carried, they were required to sign a different declaration, not containing any classification of the goods, and the company generally weighed the goods. The form of the carriers' ticking-off note was a convenient one, both to the carriers and the company, as relates to the carriers' goods, and the carriers would require, for the purpose of their trade, to know and have entries of the particulars and weights of the goods sent. The company, requiring these matters to be done by the carriers, were relieved from some of the trouble and duties which they had to perform in the case of the goods of parties not carriers. Before 1844, the company were in the habit of making an allowance to carriers of 10*l.* per cent. on the amount of the rates paid by them to the company for the carriage of parcels and tonnage goods, and during the time that such allowance was made the carriers did the same work as to weighing the goods, and filling up and furnishing the company with the declarations and ticking-off notes as they have done since the 10th of January, 1848. The above allowance has been entirely discontinued since the decision of *Parker*

Parker v. The Great Western Railway Company.

v. *The Great Western Railway Company*, 7 Man. & G. 253; s. c. 13 Law J. Rep. (N. S.) C. P. 105.

An allowance of 10*l.* per cent. on the rates paid by the carriers to the company is more than a reasonable allowance for the matters performed by the carriers.

The question for the opinion of the court on this head was, whether the plaintiff was entitled to the 10*l.* per cent. claimed by him; and if not, whether he was entitled to a reasonable allowance in respect of the weighing, and making out and delivering to the company the declarations and ticking-off notes.

The third claim of the plaintiff arises out of the arrangement for the allowance of 1,000*l.* a-year by the company to Edward Sherman, as mentioned in the agreements stated in the appendix.¹

Mr. Sherman, under the said agreements and as agent for the company, receives and collects parcels in London, and delivers them to the defendants at their station at Paddington, who carry them into the country and there deliver them to the consignees; and the company, having brought parcels from the country, hand them over to Mr. Sherman, who delivers them to the consignees in London. Mr. Sherman's duties are confined to such receipt and collection and delivery in London. Previous to the date of these agreements, Mr. Sherman received and collected goods for the company in the same manner as he has done under the agreements, but up to that time he received for his own use, and without in any manner accounting for the same to the company, certain booking-fees in respect of each parcel which in amount exceeded the sum of 1,000*l.* a-year. No booking-fees have been received by Mr. Sherman or the company since that date, and 1,000*l.* a-year was *bonâ fide* agreed to be paid by the defendants to Mr. Sherman, in consideration of his relinquishing such fees, and Mr. Sherman is employed by the defendants as their agent and servant for their convenience.

The question for the opinion of the court on this head was, whether the plaintiff was entitled to recover an allowance in respect of his having less advantage as to his goods than is afforded with respect to the goods so received, collected, and delivered by Mr. Sherman.

The fourth head of claim relates to packages called "packed parcels" in the scale-bills. By section 171 of 5 and 6 Will. 4, c. 107, it is provided that the company may fix the sum to be charged in respect of small parcels, (not exceeding 500 lb. weight,) with a proviso that that provision should not extend to articles, matters, or things

¹ By these agreements, after reciting that the company had appointed certain places as receiving-houses in London for goods to be conveyed to and from the station at Paddington, Sherman, in consideration of a fixed salary, agreed to act as the agent of the company for receiving and conveying, in his own wagons, to and from that station all goods, &c., to be conveyed to and from the station, from and to the appointed receiving-houses. And he agreed not to take any money for his own use for booking the goods, but to pay to the company all sums he should receive for such conveyance, and that such sums should be according to the regulations of the company for the time being.

Parker v. The Great Western Railway Company.

sent in large aggregate quantities although made up of separate and distinct parcels, such as bags of coffee, sugar, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time. On the back of the several scale-bills, at the end of the highest classes of goods in those bills, is an intimation that packed parcels will be charged by the company 50 per cent. in addition to their weight in those classes. Whilst these bills were respectively in force the plaintiff sent to the company packages consisting of parcels packed together in one package to be carried on the railway and delivered to the plaintiff's agent after being carried. The parcels contained in each package were collected by the plaintiff in the course of his trade as a carrier from various consignors, directed to various consignees, and each of such separate parcels sent by the plaintiff before the 15th of June, 1848, was under 3 cwt., though the package when packed was more than that weight, and each of the parcels sent after the 15th of June, 1848, was under the weight of 1 cwt., though the package exceeded that weight. The company charged and the plaintiff paid to the company, on each occasion, the carriage-rate for such packed package according to its gross weight as one entire package in the class it came under, according to the scale-bill in force at the time, together with the additional charge of 50 per cent. imposed on such package by the company in consequence of its consisting of packed parcels. The practice of the company has been to charge all carriers who sent packages containing packed parcels on the same principle. During the same period persons in trade not carriers have been in the habit when sending a parcel from London to a customer in the country, or *vice versa*, of inclosing in such parcel other parcels directed to other customers or friends in the town or place to which the parcel was being sent, and several tradesmen sending several parcels or lots of goods to persons in the country have sent all the parcels or lots to one party to be made up into one package and sent in one package by the railway to the party ordering the goods. The general existence of this practice has been known to the defendants, but they have not taken any measure to prevent such a custom being pursued or to discover individual instances of it, and have not interfered with it or enforced the payment of the 50 per cent. charge, except as against carriers. In such cases the entire package has exceeded the 3 or 1 cwt., the limit within which parcel-rate was to be paid, according to the scale-bill in force for the time, but the several parcels have each fallen short of such weight.

Under this head the question for the opinion of the court was, whether the plaintiff was entitled to recover the amount of the said extra charge of 50 per cent. so paid by him, or any and what portion thereof.

The fifth head of claim arises from alleged overcharges by the defendants beyond the accounts which ought to have been charged by them for the carriage of the plaintiff's goods according to the proper interpretation of the several modes of charge expressed in the scale-bills.

The company charged the plaintiff for the carriage on the railway of packages up to 3 cwt. down to the 15th of June, 1848, and of packages up to 1 cwt. after that date, as parcels upon the parcel-scale. The several descriptions of the goods carried were divided into several classes according to the "classification of goods" which will be found on the back of each of the scale-bills. These classifications differ on each of the bills, the goods being divided, according to the bill A, into five classes, the last of which is described as "miscellaneous," and bill B making a division into five classes without any general or miscellaneous class, and bill C only containing four divisions and also being without any miscellaneous class. According to the first of these scale-bills all packages of less than 3 cwt. are to be charged in their respective class according to the first table of charges, the parcel-rate; and all above that weight in their respective class according to the second and lower table of charge, the tonnage-rate. According to the other two scale-bills the dividing point between the parcel and tonnage rate is fixed at 1 cwt. The plaintiff and all other carriers using the railway collect from their customers in London or the country the original consignors' parcels or packages of various weight, and containing goods of various classes, which are to be carried by the defendants and delivered by them to the plaintiffs or other carriers' agents, who distribute them to the parties the ultimate consignees for whom they are intended. The carriers deliver all the goods so collected by them to the defendants in one lot or wagon-load, and receive them in like manner in one lot or wagon-load after they have been carried by the defendants, but, as already mentioned, in reference to the previous head of claim, they deliver with the goods the declaration and ticking-off note, which gives the names of the ultimate consignees as well as that of the carrier who sends and is to receive the goods. The company do not treat the carrier as consignor and consignee of the goods for the purpose of calculating the charges to be made for the carriage of the goods, but adopt the following system: When several packages of goods of different descriptions but of one class appear to be intended for the same ultimate consignee, all such goods are lumped together and charged at one gross weight according to tonnage-weight, if together they amount to a weight which would bring them into the tonnage-scale, although severally the packages might be of such a weight as would have brought them into the parcel-rate; but if such goods, though in the same class, be not intended for the same ultimate consignee, each package or lot of packages going to each ultimate consignee is charged separately and according to the tonnage or parcel rate, according as the weight is above or below the dividing point between the parcel and tonnage rates; thus, if ten packages of $\frac{3}{4}$ cwt. each of goods of the same class be directed to one ultimate consignee, the whole would be charged at tonnage-rate on $7\frac{1}{4}$ cwt., but if such packages were directed to ten different ultimate consignees each package would be charged at $\frac{3}{4}$ cwt. at the parcel-rate. The tonnage being lower than the parcel rate, a proportionate advantage is thus derived to the company.

Parker v. The Great Western Railway Company.

The plaintiff contends that the company are entitled to charge him tonnage-rate only on the aggregate weight of all the packages containing goods of one class, whether such packages are intended for the same ultimate consignee or for several; and on this head the question for the court will be, whether the plaintiff is entitled to recover from the company the amount of such alleged overcharges.

The sixth head of claim arises on the scale-bill A, which remained in force until the 15th of June, 1848.

On some occasions when packages sent by the plaintiff, as before mentioned, contained goods of one class, and each package was of a weight less than 3 cwt. and was intended for different ultimate consignees, but the several packages together exceeded 3 cwt., the company charged the same under the fifth class, as miscellaneous goods, on which, in addition to the higher rate of charge a further sum of 2*d.* per package is charged, as mentioned under the heading of the fifth class on the back of the scale-bill A; as, for instance, three packages of meal (which is mentioned in class four) each weighing 1½ cwt., and each directed to a different ultimate consignee, have been charged 4½ cwt. under the fifth class, with an additional charge of 2*d.* on every package, and the entire sum thus charged has been less than the sum which would have been charged if each package had been charged under the parcel-rate.

The plaintiff contends that the company had no right to charge him under such circumstances as for goods of a miscellaneous description, and were bound to charge him only the rate charged according to the tonnage-rate under the class to which the goods belong, as in the instance mentioned under the fourth class; and on this head the questions will be—first, whether the company were justified in charging such packages of goods under the miscellaneous class; and if not, secondly, whether the company would be entitled to charge the said packages under the parcel-rate?

The seventh head of claim of the plaintiff is in respect of charges made by the company, which he alleges exceed the charges allowed to be taken by the company's act of parliament.

In the fourth of the three scale-bills, as forming part of the fourth class, will be found certain specified articles which are to be charged according to such fourth class, and, in addition, a further charge of 50 per cent. or 100 per cent., as therein mentioned, is imposed on such goods. All such specified articles are of the class for the tonnage of which the company are authorized by their act of parliament (5 and 6 Will. 4, c. 107, s. 164) to charge at the rate of 3*d.* per ton per mile, and in addition thereto the company are entitled, under the 50th section of 7 Vict. c. 3, to charge for locomotive or steam power and for carriages *such a sum as they may think expedient*: the charges on the scale-bills include both the carriage and the tonnage of the said goods, and the locomotive or steam power and use of carriages, but no specific charge contained in the scale-bills is appropriated to either of such modes of charge, the whole charge under such scale-bills being charged by the company, and paid by the carrier, as the consideration for the performance by the company of the entire of

Parker v. The Great Western Railway Company.

those services. The charge under the said fourth class, with the additional charge of 50 per cent. or 100 per cent., as the case may be, on the said specified articles, exceeds the sum of 3*d.* per ton per mile.

The questions for the opinion of the court on this head were, first, whether the company were entitled to charge and take the said additional sums of 50 and 100 per cent. respectively on the said specified goods; and, secondly, whether they were entitled to charge and take so much of the said original charge, and to take 50 or 100 per cent. additional, as exceeds the 3*d.* per ton per mile, and a reasonable amount to be charged and taken by the company for the use of locomotive or steam power and carriages.

The eighth head of claim arises as follows: The plaintiff contends that when he has collected from several original consignors several parcels intended for several ultimate consignees, the whole of which together do not in weight exceed the dividing-point between parcel and tonnage rates, according to the scale-bill from time to time in force, and do not amount to 500 lb. in weight, the company are not entitled, under the 171st section of their act, 5 & 6 Will. 4, c. 107, or any other enactment, to charge each of such parcels separately, or the whole of such parcels together as parcels or a parcel, or otherwise than according to the tonnage-rate. The plaintiff contends that such several parcels, by his having collected them together and by his delivering them to the company in one lot, and also receiving them from the company in one lot, become connected together, so that the company are not justified in charging them as single parcels or a parcel; and that if they cannot be treated as single parcels, the company can only charge for the same as tonnage goods, according to their weight, under the 164th clause of their act, 5 & 6 Will. 4, c. 107, which authorizes a charge by them of so much per ton per mile.

The questions for the opinion of the court on this head were, first, whether the company can charge such parcels at the parcel-rate published in pursuance of the said 171st section of the said act, where such parcels contain goods of the same class, according to the classification of goods; and, secondly, whether they can charge the same according to such parcel-rate where the same contain goods of different classes in two or more packages of each class.

November 12, 14. *Peacock*, (*Willes* with him,) for the plaintiff.

The first claim is for the recovery of charges made by the defendants for "loading, unloading, and risk of stowage," under scale-bill B, and for "loading, unloading, and covering," under scale-bill C. Neither of these charges could legally be made by the company in addition to the carriage rates. In *Curling v. Long*, 1 Bos. & P. 634, it was said correctly that all the expenses of loading a vessel are included in the freight. It is clear that before the 1 and 2 Vict. c. 92, the company could not make any extra charge for loading. By 5 & 6 Will. 4, c. 107, s. 164,¹ they are empowered to take for the

¹ The following are the clauses of the company's acts upon which the several arguments turned, as far as they are material:—

Parker v. The Great Western Railway Company.

tonnage of articles conveyed along the railway certain tonnage rates; that is, where people bring their own trucks and carry their own

5 & 6 Will. 4, c. 107, s. 163. That all persons shall have free liberty to pass along and upon, and to use and employ the said railway with carriages properly constructed as by this act directed, upon payment only of such rates and tolls as shall be demanded by the said company, not exceeding the respective rates or tolls by this act authorized, and subject to the provisions of this act, and to the rules and regulations which shall from time to time be made by the said company, or by the said directors, by virtue of the powers to them respectively by this act granted.

Sect. 164. That it shall be lawful for the said company to demand, receive, and recover, to and for the use and benefit of the said company, for the tonnage of all articles, matters, or things which shall be conveyed upon or along the said railway, any rates or tolls not exceeding the following; (that is to say), [here follow the rates or tolls on different enumerated sets of articles, the highest tolls being 8d. per ton per mile.]

Sect. 165. That it shall be lawful for the said company to demand, receive, and recover, to and for the use and benefit of the said company, for or in respect of passengers, beasts, cattle, and animals conveyed in carriages upon the said railway, any tolls not exceeding the following, [then follow the tolls.]

Sect. 166. That it shall be lawful for the said company, and they are hereby empowered to provide locomotive or stationary engines, or other power for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals, upon the said railway, and also along and upon any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said company shall think proper, in addition to the several other rates, tolls, or sums by this act authorized to be taken.

Sect. 167. That it shall be lawful for the said company and they are hereby authorized, if they shall think proper, to use and employ locomotive engines, or other moving power, and in carriages or wagons drawn or propelled thereby to convey upon the said railway, and also along and upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act authorized to be taken: Provided always that it shall not be lawful for the said company or for any person using the said railway as carriers, to charge for the conveyance of any passenger upon the said railway any greater sum than the sum of 3d. per mile, including the toll or rate hereafter before granted.

Section 171. That it shall be lawful for the said company from time to time to make such orders for fixing, and by such orders to fix the sum to be charged by the said company in respect of small parcels (not exceeding 500 pounds weight each) as to them shall seem proper: Provided always, that the provision hereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature, which may be sent upon the railway at the same time.

Section 174. That it shall be lawful for the said company from time to time, as they shall think fit, to reduce all or any of the rates or tolls by this act authorized to be taken, and to take the reduced rates, and afterwards from time to time again to raise the same, or any of them, and then to take such higher rates, so that the same respectively shall not at any time exceed the amount by this act authorized.

Sect. 175. That the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged equally and after the same rate per ton per mile throughout the whole of the said railway in respect of the same description of articles, matters, or things, and that no reduction or advance in the said rates and tolls shall, either directly or indirectly, be made partially or in favor of or against any particular person or company, or to be confined to any particular part of the said railway, but that every such reduction or advance of rates and tolls upon any particular kind or description of articles, matters, or things, shall extend to and take place throughout the whole and every part of the said railway, upon and in respect of the same description of articles, matters and things so reduced or advanced, and shall extend to all persons whomsoever using the same, or

Parker v. The Great Western Railway Company.

goods on the railway. Then, sect. 165 gives the tolls allowed for carrying passengers or cattle. By sect. 166 the company are empowered to provide engines or other locomotive power, and to receive such sums as they may think proper for their use, in addition to the other rates and tolls mentioned in that act. Then, by sect. 167 a further power is given to *carry* goods and make reasonable charges for their conveyance. Sect. 174 gives the company power to fix the sums to be charged for parcels of less than 5 cwt. as they think proper. These are the powers of the railway with respect to charges before the 7 Will. 4 & 1 Vict. c. 92. The charges to be paid are fixed by the scale-bills made from time to time. Then came that act, and sect. 44 gave them a power to charge for putting the goods into and taking them out of the trucks; but that is only if they are required to do so.

[MAULE, J. That is, where people carry their own goods in their own trucks on the railway; then the company are employed by that section to make charges for loading and unloading (if they do that work) in proportion to the weight of the thing carried. That statute authorizes the company to carry on a trade of that kind, and is satisfied by this view. It seems absurd to say that the company is to make an additional charge when it carries goods in its own carriages for putting them into and taking them out of the carriages. Loading and unloading the goods are things which it does for its own purposes, and incident to its own duty. It seems as absurd to make a charge for loading and unloading into and out of their own carriages, as to make a charge for covering the goods with a tarpaulin while in the middle of their course. We think there is no doubt at all that the rate they are entitled to charge for carrying includes putting into the carriage and taking out again and covering.]

carrying the same description of articles, matters, and things thereon, any thing to the contrary thereof in any wise notwithstanding.

7 Will. 4 & 1 Vict. c. 92, s. 44. That it shall be lawful for the said company from time to time and at all times hereafter to demand, receive, and recover a reasonable charge for the loading and unloading, or weighing any articles, matters, or things *which they may be required to load, unload, or weigh*; and also to demand, receive, and recover for the wharfage or warehousing, or the standing-room of all articles, matters, and things loaded, landed, or placed in or upon any of the wharves, landing places, stations, or warehouses of the said company the rates, tolls, or duties following, &c.

7 & 8 Vict. c. 3, s. 50. That it shall be lawful for the said Great Western Railway Company, *whenever they shall act as carriers*, or shall provide locomotive or steam power or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages such sum (*not exceeding the sums (if any) limited by the said recited acts or any of them*), and that either *per ton or per mile*, or by bulk, measure, number, or admeasurement, or by fixed charges as they shall think expedient: Provided always, that in whatever way the said charges are made they *shall be made equally to all passengers and to all persons in respect of all animals, and of all goods, wares, merchandise, articles, matters, and things of a like description and quality*; and conveyed in or propelled by a like carriage or engine, passing only over the same portion of and over the same distance along the said railways, or either of them, and *under the like circumstances*; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favor of or against any particular company or person.

Parker v. The Great Western Railway Company.

The second claim is put by the plaintiff in this way :— By section 175, of 5 & 6 Will. 4, c. 107, it is provided “that all the rates to be taken by virtue of that act shall be charged equally at the same rate per ton per mile, in respect of the same description of articles, and that no reduction or advance in the said rates shall, either directly or indirectly, be made partially, or in favor of or against any particular person or company.” The plaintiff says that he has been made to pay a larger sum for the carriage of the same goods than other persons, not carriers, have paid, because he has been required to do something of value besides paying the carriage-rates before his goods were carried, which was not required of the public.

[MAULE, J. That does not entitle you to an action for money had and received.]

The principle of this claim is the same as that of the first point decided in *Parker v. The Great Western Railway Company*.

[MAULE, J. In that case they took a liquidated sum from A. greater than from all other carriers. Suppose the company were not entitled to insist upon these things being done, still we do not think it gives you a right to recover as for money had and received. My impression certainly is, that the company had no right to require the declaration and ticking-off note to be signed, but it would be entirely the subject of an action for consequential damages, and cannot be recovered in an action for money had and received.]

It is submitted that it is within the terms of the submission of reference, which includes other matters in difference.

[TALFOURD, J. It is “matters in difference relative to the charges made by the defendants upon the plaintiff and to payments made by him to them.”

MAULE, J. That is solely for the purpose of having the accounts settled between the parties.]

If it is within the terms of the submission, the plaintiff will be barred from any remedy hereafter.

[JERVIS, C. J. The court inclines to think that it is not within the terms of the submission.]

The third head of claim is for an allowance in respect of the agreement with Sherman. By that agreement the company in effect undertook to take, and have taken, a less sum by 2*d*. for the carriage of each parcel conveyed for persons who have employed Sherman than they have taken from persons who have employed other carriers. This is an unequal charge, and the plaintiff is entitled to recover back the excess of what he has paid over what other persons have paid per parcel. In *Pickford v. The Grand Junction Railway Company*, 10 Mee. & W. 399, it was held that a charge of 65*s*. per ton made to all persons (except C. & H.) who would be ready themselves to receive their goods at Camden Town station, was unequal, the company having agreed with C. & H. that they should carry all goods carried by the railway from Camden Town to London, and deduct 10*s*. per ton out of the 65*s*. This is a similar advantage to Sherman, and enables the company, through him, to carry and book for those who employ him for the same price as they carry alone for those employing the plaintiff.

[MAULE, J. There is no statement that they do book; it is stated that the booking fees were relinquished by Sherman: he has the 1,000*l.* in lieu of booking fees, and where a compensation is given in lieu of fees, it generally happens that the thing for which the fees were paid is abolished; at all events, it is not found that they do now book.]

The fourth claim is in respect of the 50 per cent. for the carriage of packed parcels charged to carriers, and not to the public. The company had no right to make this charge to carriers only, and the plaintiff is entitled to recover it back. By section 171, of 5 & 6 Will. 4, c. 107, the company may fix the charge for small parcels as to them shall seem proper; but this provision is not to extend to things sent in large aggregate quantities, but only to single parcels. Here the company have charged carriers one sum and the public another for carrying precisely similar parcels. That they cannot do.

[MAULE, J. They have no business to open their eyes to the fact of the carriers being carriers. They have no right to favor themselves as carriers.]

JERVIS, C. J. It was not argued the other day (In *Edwards v. The Great Western Railway Company*, *post*, p. 447,) that if there was an inequality the company could maintain the charge.]

By his fifth claim the plaintiff contends that the company are only entitled to charge tonnage-rate upon the aggregate weight of packages of less aggregate weight than the dividing point in the scale-bills containing goods of one class, but of different descriptions, whether such packages are intended for the same ultimate consignee or for several. The company have no right to charge the tonnage-rate when the packages consist of goods of one class directed to one consignee, and the parcel-rate for the very same packages when directed to several consignees, discovering the contents and consignees of the parcels by means of the ticking-off notes which the carriers are obliged to make out.

[JERVIS, C. J. The 171st section of 5 & 6 Will. 4, c. 107, expressly provides that the power to make charges for small parcels shall not extend to articles sent in large aggregate quantities, though made up of separate parcels, such as sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature. We are with you upon this point at present.]

The sixth claim arises upon scale-bill A. The company charge for three packages all consisting of meat, directed to different consignees, an extra charge, as for miscellaneous goods, though the whole together amount to more than 3 cwt. Meat is one of the articles mentioned in the fourth class of the scale-bill, and as such ought only to be charged tonnage-rate when sent in large aggregate quantities. Being directed to separate consignees does not render it liable to be charged at a higher rate. It is within the proviso of section 171, just cited.

Upon the seventh claim the plaintiff contends that 3*d.* per ton as toll, and a reasonable sum for locomotive power and carriages, is all that the company are entitled to charge. By section 50, of 7 & 8 Vict. c. 3, the company are empowered, "whenever they act as car-

Parker v. The Great Western Railway Company.

riers, to provide locomotive or steam power or carriages for the conveyance of goods, to charge for such locomotive power and carriages such sum as they shall think expedient, not exceeding the sums, if any, limited by the recited acts," either per ton or per mile, provided such charges shall be made equally. The "sum limited" for tonnage of goods, such as those in question, by section 164, of 5 & 6 Will. 4, c. 107, is 3*l.* per ton per mile. Then section 167 of that act shows what is the sum limited for the use of locomotive power and carriages. It provides that "the company may, if they think proper, use locomotive engines, and in carriages drawn thereby, carry all such goods as shall be offered to them for that purpose, and make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the rates or tolls by this act authorized." Thus all that they are entitled to take beyond the toll in section 164, is a reasonable sum for the use of locomotive power and carrying in their own carriages.

[MAULE, J. The question is, whether the company can charge any thing in addition to the tolls for the use of the railway and a reasonable sum for the use of the locomotives and carriages. Section 50, of 7 & 8 Vict. c. 103, is not restrictive; it leaves section 167, of 5 & 6 Will. 4, c. 107, untouched. They are still entitled to a reasonable sum for *conveyance*, that is, for acting as carriers, loading, unloading, and risk. The proper answer to this question will be that they are entitled to take the additional sums of 50*l.* and 100*l.* per cent. provided they do not exceed a reasonable sum for conveyance in addition to the charges for the use of locomotives and carriages.]

He also contended that the charges for conveyance and for use of carriages could not be made in one sum, but that they should be made separately.

[JERVIS, C. J. They may be made in one sum if they are reasonable.]

Under the eighth claim the question arises whether, where a number of small parcels are collected together by the same carrier to be delivered to separate consignees, such parcels collectively amounting to less than the dividing point in the scale-bills, the company, under section 171, of 5 & 6 Will. 4, c. 107, are entitled to charge each of such parcels separately, or the whole together as parcels or as a parcel, or whether they are bound to charge for them at the tonnage-rate. It is submitted that they fall within the proviso in section 171, which says that the provision empowering the company to fix a parcel-rate "shall not extend to things sent in large aggregate quantities, though made up of separate and distinct parcels, such as bags of sugar, &c., but only to single parcels unconnected with parcels of a like nature."

[JERVIS, C. J. They cannot charge each separately as a parcel, if they are of a like nature; but if altogether they amount to less than the specified weight, they may charge the whole as one parcel. The words "large" and "small," in section 171, draw the distinction between cases where the whole exceed 5 cwt. and cases where they do not.]

November 14. *Keating*, (*Channell*, Serjt., *Hoggins*, and *Cripps*, with

Parker v. The Great Western Railway Company.

him,) for the defendants. The first, second and third claims may be considered as disposed of by the observations of the court: the first for the plaintiff, the others for the defendants. Upon the fourth claim, if the facts bring it within the decision of *Parker v. The Great Western Railway Company*, it must be admitted that the charge could not be sustained, but that the company were merely not so astute to discover the practice in the case of other persons as they were in the case of carriers.

[JERVIS, C. J. They require the carriers to disclose the number of parcels in each package, and the names of the consignees, and charge them 50 per cent. additional. This they do not do with the public.

WILLIAMS, J. The legislature seems to have had such a case in view. Section 175, says, "no reduction or advance shall either directly or indirectly be made partially in favor of or against any particular person."]

The fifth head of claim is divided into two periods, the one up to the 15th of June, 1848, under scale-bill A, the other subsequently. In scale-bill A, the defendants give notice that on miscellaneous goods "not being aggregate of one kind or class" an additional charge will be made on each package up to 2 cwt. This is not a question of inequality, but arises upon the construction of the scale-bill. Now, scale-bill A, having treated "kind" and "class" as the same thing, it must be admitted that the view taken by the court in *Edwards v. The Great Western Railway Company*, *post*, p. 447, is against the defendants as far as regards the charges made before the 15th of June, 1848. But after that period scale-bill B, came into force, and the company then had the power of charging parcels of goods of the same class, but of different kinds, as small parcels at the parcel-rate. That scale-bill contains nothing to show that "kind" and "class" mean the same thing. It depends on section 171, of the 5 & 6 Will. 4, c. 107, and the question is, whether the company can, under the circumstances stated, charge parcels of one class in the scale-bill as small parcels, or not. The mere fact of their being brought at one time in one wagon makes no difference; nor does the fact that they are of one class; that is not the same thing as being "parcels of a like nature" under section 171.

[MAULE, J. The word "class" is a creature of the company; the legislature recognizes no such word.]

No. Many of the articles in the same class are as dissimilar in nature as possible. The sixth claim will not be further contested. Upon the seventh claim the court ought to decide that the company are entitled to charge the 50 and 100 per cent. additional.

[MAULE, J.—We can only answer the question hypothetically, and say, if the sum charged for conveyance does not exceed a reasonable sum for conveyance under section 167, of the 5 & 6 Will. 4, c. 107, they are entitled. We cannot assume that it is reasonable.]

The Court ought to assume it, inasmuch as the plaintiff has to make out his right to recover.

[MAULE, J.—The question put to us is, whether the company are entitled to make the charge. We cannot tell. We can only say they are entitled to charge what is reasonable for conveyance.

Parker v. The Great Western Railway Company.

JERVIS, C. J. — We answer it in this way. They are not bound to charge a separate sum for each matter. They may charge one lumped sum provided it does not exceed the toll, and a reasonable sum as carriers for conveyance; not to be limited to the use of the railway or the carriages.]

With regard to the eighth claim, the plaintiff contends that by merely bringing a number of parcels together, and delivering them to the company in one lot, the company are prevented from treating them, whatever their weight, as parcels within the meaning of section 171, and can only charge the tonnage rate under section 164.

[JERVIS, C. J. — Where the separate parcels differ in their nature they may be charged as separate parcels; where they are "of like nature" they are to be charged as one parcel if within the weight.]

MAULE, J. — They are separate parcels where they differ in their nature, except so far as the company may have altered that by holding out to the public that they will make them as "class" goods.]

The classification is no criterion; the criterion is, being aggregate of the same kind.

[JERVIS, C. J. — By goods of the same "class" the arbitrator means the same classification in the scale-bills.]

But the question here raised is, whether the fact of delivering the parcels in one lot, collecting them together, and receiving them in one lot, brings them within the tonnage-rate.

Peacock, in reply. With reference to the fifth question, the company have no right to make a distinction between cases where the parcels are directed to the same and where they are directed to different consignees. *Parker v. The Great Western Railway Company* decided that the company were bound to treat every carrier as consignor and consignee. They are not doing that where they charge them differently, according as the parcels are directed to one or to different consignees.

[MAULE, J. — They charge the public in the same way.]

They would charge for precisely the same goods, packed in the same way, a different sum to the same carrier, according to the directions of the parcels. That is not an equal charge within section 175, the words of which are similar to those of the act of parliament discussed in *Pickford v. The Grand Junction Railway Company*.

[WILLIAMS, J. This part of your argument assumes that they have a right, if they please, to treat them as separate parcels, and charge the parcel-rate.]

Yes.

[WILLIAMS, J. — Then instead of insisting upon the right, which it is assumed they have, they say they will not enforce it in cases where the parcels are all consigned to one person. That applies to the public, several of whom combine to have their goods consigned to one person, though their ultimate destination be different. That shows that the company have been too indulgent.]

Too indulgent to one class of persons, and not sufficiently so to another class. That make the charges unequal.

[JERVIS, C. J. — I think it is an unequal charge. Look at the 7 &

Parker v. The Great Western Railway Company.

8 Vict. c. 3, s. 50. They charge the same goods, that is, "goods of a like description and quantity passing over the same distance and under the like circumstances," a different sum. The difference of consignees does not vary the circumstance.]

Upon the last claim. It is not contested that where several parcels are delivered together and do not exceed the limit of the parcel-rate, they may be charged as a parcel; and that parcels of different classes may be charged as separate parcels; but where several parcels are of one class in the scale-bills they cannot be charged separately; they are "parcels of a like nature" within the meaning of section 171, of the 5 & 6 Will. 4, c. 107, and the company themselves have said they are so, by classifying them.

JERVIS, C. J. — The course of the argument and the discussion during this case render it unnecessary to dwell at any length upon it, because the decision or opinion of the Court has already been thrown out upon each distinct head of claim, and the argument, by admissions, has been narrowed now, I believe, to a very few points. The first claim is a claim by the plaintiff to recover back from the defendants the amount paid by him to them of certain sums charged by them in addition to their carriage rates for "loading, unloading, risk of stowage, and covering." He says, that as the company are, by sect. 44, of the 7 Will. 4 & 1 Vict. c. 92, only entitled to charge for that kind of service when they are required, and as he does not require it, but they only force it upon him, he was not bound to pay it. The Court clearly thought that section 44, meant only that the authority to charge an additional sum for loading and unloading was only given when that kind of work was done by the company not as carriers, but for other people carrying upon their own account. But when they act as carriers themselves, the charge they make for carrying includes the charge for loading; and as they have never been requested to do this work for Mr. Parker, I apprehend it is quite plain that this claim must be allowed.

With respect to the second claim. Mr. Parker says, "I am entitled to an allowance" (this was the view of the matter that occurred to me at the time) "because I have done certain work which the public does not do, and which you do for the public; and inasmuch as formerly you did allow to carriers a deduction of 10 per cent. in respect of that and other things" (as was established in the case of *Parker v. The Great Western Railway Company*.) "I am entitled to that allowance which you formerly made to carriers, although you discontinue it now." The short answer is this, whether that be so or not, it is unnecessary to enter into the inquiry whether he ought to be allowed for it, or can have any ground for complaint. It is not an allowance in respect of which an action can be brought for money had and received; his remedy was not by an action for money had and received, but by an action for damages by an injury sustained, which is not within the terms of this discussion, or intended to be submitted to us.

The third claim is founded upon this: the plaintiff says, "It is

Parker v. The Great Western Railway Company.

clearly established, not only by the act of parliament, but by decisions upon it, that the charge for carrying must be equal to everybody. Now, they are not equal between me and those dealing with Mr. Sherman, because you allow him 1,000*l.* a-year for booking for the public; you charge the public nothing for that, whereas I, as a carrier, do the booking and am paid 2*d.* for it, and I get no allowance in respect of that; therefore, when you charge the public through Mr. Sherman but 19*s.* 10*d.*, you charge me 1*l.*, because I have to pay the 2*d.* in addition for booking, which the public have to pay me." That was clearly answered during the course of the argument; it was not an inequality of charge; the plaintiff has no right to say the charges are unequal; or that it makes the company charge unequally, because he superadds a charge for booking which the company do not require. It cannot be said, because, the company pay Mr. Sherman a certain sum for collecting, that that entitles the plaintiff to a corresponding allowance. The booking is merely something for his own benefit. That disposes of the third claim.

The overcharge sought to be recovered in the fourth claim is admitted not to be sustainable on behalf of the defendants, because it is a charge which they have made of an extra 60 per cent. in respect of packed packages, which, as appears upon the facts found by the arbitrator, is not a charge made upon the public. It is admitted, if that be so, Mr. Parker is entitled to recover, because not only is it necessary under the 175th section (of the old act of parliament,) but the 50th section of the 7 & 8 Vict. c. 3, enacts expressly that the charge shall be equal to all the public, under the same circumstances; and it is admitted there is no distinction or difference, from the fact of Mr. Parker being a carrier, between him and the rest of the public; therefore, the charge being to Parker 50 per cent. more than to the public, he is entitled to recover that overcharge.

The fifth claim depends partly upon the construction of the scale-bill, and partly upon the 171st section of the 5 & 6 Will. 4, c. 107. It admitted that the question is concluded by what passed on a former occasion in so far as the scale-bill is concerned, because whether the company would be justified or not in charging the matters now in question as parcels, if they profess by their scale-bill to carry upon a particular contract for the public, they must carry on that contract; and the scale-bill applying up to the month of June, 1848, it is admitted that for the charges up to that time the plaintiff is entitled to recover. The question as to the time after that depends upon the construction of the 171st section of the 5 & 6 Will. 4, c. 107. Now, it is said, they are entitled to charge as small parcels, parcels in the aggregate of goods in the same class, because the act provides that small parcels not exceeding 5 cwt. may be charged as they deem proper; and though it provides that these small parcels shall not extend to articles sent in large aggregate quantities made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, Mr. Keating contended, that they were justified as far as the facts appeared to the court in making the charge they did, because, in order to entitle parties to avail themselves of this proviso

Parker v. The Great Western Railway Company.

the articles must be of a like kind and must be in parcels of a like nature. Then it was pointed out, by Mr. Peacock, that although that might be the right construction of the act of parliament, yet that the company did not properly apply that construction equally to all people; but that they looked, in the application of it, to the ultimate consignee of the goods, and where one carrier sends a certain number of goods to one consignee they charge in the aggregate; and where another carrier, or the same, sends goods of a similar kind, but to different consignees, they charge them as parcels, refusing to put them in the aggregate.

Then, it is suggested that this mode of charging is unequal, because, looking at the 50th section of the 7 & 8 Vict. c. 3, (which was in force during the time to which this question applies,) they are goods of a like description and quantity carried by a like engine, by the same carriage, along the same portion of the railway, under the same circumstances; for, the fact of the party being a carrier, or a different ultimate consignee, makes no difference in the circumstances; and the act of parliament says, that being so, there shall be no variation or difference of charge. But there is a variation and difference according to the ultimate destination to one or more consignees. It is, therefore, unequal *pro tanto* to the extent of the difference between what they would charge when directed to one consignee and when directed to different consignees. I think that this being money paid in excess of what they had a right to charge, an action for money had and received will lie for it, to that extent. We must not enter into the general question, whether, having paid more than he was bound to do, he would be entitled to recover it back, because that is a point not now suggested as a ground for our decision.

Upon the sixth claim it is clearly admitted that the plaintiff is entitled to recover. The sixth is for meat,—the articles there are articles all of the same kind under the scale-bill. The company are not entitled to charge even that 2*d.* per parcel under the sixth class, because they had no right to put it under the miscellaneous class,—meat being all of one kind, which should come under one or the other classes, as the case might be. Now, the seventh claim gives rise to considerable difficulty, not so much upon the construction of the act of parliament as with reference to the question put to the court by the learned arbitrator. There was considerable difficulty in arriving at a conclusion as to the proper construction of the 50th section; but that becomes unimportant, because the arbitrator has put his own construction upon it: he says this, (assuming that construction to be correct,)—Can the company charge 50 per cent. or 100 per cent. in addition to the rate of toll; and further, can they charge in addition to the 3*d.* such sum as is a reasonable amount to be charged for the use of locomotive power and carriages?

Now, the question arises in this way—the 164th section says, if other people use the Great Western Railway, the company may take a certain toll; the 166th section says, the Great Western Railway Company may let out power at such a sum as they may think fit;

Parker v. The Great Western Railway Company.

the 167th section says, they may carry goods in carriages and charge such a sum for conveyance, in addition to the toll, as may be reasonable, provided in the case of passengers it shall not exceed 3 *l.* 2*d.* Then comes the 50th section of the 7 & 8 Vict. c. 3, which (without discussing the construction of the arbitrator) says they shall charge what they may deem expedient for locomotive power and carriages. I apprehend it is perfectly plain they are not bound in that charge to say so much a ton according to the 164th section, and so much a mile for the use of carriages and power, but they are entitled to charge much more than that, because they are entitled to charge "as carriers" in the words of the 167th section for the "conveyance of goods." The amount which they are entitled to take has to be found as a matter of fact—they are entitled to charge any sum beyond the 3*d.*, be it 50 or 100 per cent., whatever sum it may be which is reasonable to be paid to them as carriers for the conveyance of goods. That would be a question of fact, whether it is reasonable or not reasonable; if it is reasonable it answers both questions. They are entitled to recover, even if it were to the extent of 50 or 100 per cent. according to the finding of the fact as to its being reasonable. If it is unreasonable, then Mr. Parker is entitled to have the deduction of so much as has been paid in excess of the reasonable charge beyond the toll as the amount of compensation. The payment need not be for carriages and power only, but, as carriers, for the conveyance of goods, which includes loading, unloading, and risk, and various other matters in the nature of a carrier's trade, which it is not necessary to enter into.

Now, the eighth claim likewise raises a little difficulty upon the form of the question. Mr. Parker says, "I collect a number of parcels, and bring them to you in the lump in my own wagons, and therefore I am entitled to be charged as for tonnage goods." The company say, "No; the fact of your bringing them altogether does not make the distinction and difference mentioned in the 171st section." I apprehend the question may be answered in this way. If the parcels are such that the company can charge them at the parcel-rate to the public in pursuance of the 171st section of the act of parliament, they would be chargeable. If they are chargeable under that section of the act, as containing goods not of the like nature or parcels of the like kind, they may charge in the same way. The fact of their being of the same "class" under the scale-bill for a different purpose, does not disentitle the company from charging under those circumstances. When they are of different kinds they would be entitled to charge them as different parcels. I have stated the opinion of the court, and have gone through the different heads of claim. The result will be, that the matter wholly resolves itself into two or three disputed points, as we have pointed out in the course of the argument, and the decision will be, upon some heads for the defendants, and upon others for the plaintiff. *Judgment accordingly.*

The case was referred back to the arbitrator to assess the damages in conformity with the decision of the court.

Edwards v. The Great Western Railway Company.

EDWARDS & another, assignees of PARKER, v. THE GREAT WESTERN RAILWAY COMPANY.¹

November 8, 10, 15, 1851.

Railway — Carriers — Equality of Charges — "Like Circumstances" — Scale Bills — Goods aggregate of "Class or Kind" — Different Consignees — Deductions — Allowances — Interest.

The Great Western Railway Company, before the 7 & 8 Vict. c. 3, came into operation, was obliged by the 2 & 3 Vict. c. 27, s. 24, to charge for carriage to all persons equally, but they charged P., a carrier, differently from and more than the public:—

Held, in accordance with *Parker v. The Great Western Railway Company*, that the overcharge was recoverable as money received to the carrier's use.

The 7 & 8 Vict. c. 3, by sections 48, 49, and 50, repealed the 2 & 3 Vict. c. 27, s. 24, and reenacted it, with the difference that in section 50, the words "under like circumstances" were introduced. The company continued to charge P. more than the public:—

Held, that he might recover the overcharge, the fact of his being a carrier only not rendering the circumstances unlike.

Under the company's original act, 5 & 6 Will. 4, c. 107, s. 171, the company was authorized to fix the sums to be charged for small parcels, provided they were not sent in large aggregate quantities, made up of separate and distinct parcels. The company published scale-bills, in which they specified divers classes, containing different kinds of goods, and one class comprised miscellaneous goods, "not being aggregate of one class or kind," which were charged at a higher tonnage rate, with an extra charge for each parcel. The company charged P. under the miscellaneous class for aggregate goods, which, though of different kinds, were within the same class in the scale-bills:—

Held, that this was an overcharge, and that the word "class" must be taken to mean something more than "kind," and to apply to the classes mentioned in the scale-bills.

Held, also, with regard to all the foregoing overcharges, that it made no difference that the separate parcels, which were all to be delivered to the carrier or his agents at the end of the journey, were destined for different ultimate consignees.

P.'s servants assisted the company's servants in loading, unloading, and weighing, but not at the company's request, and the public gave no such assistance. The company before the decision of *Parker v. The Great Western Railway Company*, had allowed carriers 10 per cent. for such assistance, and P. in this case claimed a similar deduction:—

Held, that P. was not entitled to any deduction on this ground.

The company, before the decision in *Parker v. The Great Western Railway Company*, had entered into an agreement with K. to allow him 10 per cent. discount; but after that decision they refused to make the allowance. K. brought an action and recovered a verdict for the 10 per cent., which the company paid accordingly:—P. claimed the 10 per cent. on the ground that he and K. had been charged unequally, K. having been allowed that amount:—

Held, that this was not an allowance which made the charge unequal.

P. paid the overcharges under protest, and after notice of action to the company he sent in a claim in writing of interest. It was objected, that as the notice of action did not contain a claim for interest it could not be recovered; but as there was no plea of want of notice of action, and as the action and all matters in difference had been referred to an arbitrator:—

Held, that the arbitrator might award interest under the 3 & 4 Will. 4, c. 42, s. 4.

DEBT by the plaintiffs, assignees of R. Parker, a bankrupt, for money received by the defendants to the use of Parker, and on an account stated between them and him, before he became a bankrupt.

Plea — Never indebted, by statute.

¹ 21 Law J. Rep. (N. S.) C. P. 72. This case was argued before the case in which Parker himself was the plaintiff, (*ante* p. 426.) but as the judgment in the other case was delivered first, it is deemed more convenient that that case should appear first in the report.

Edwards v. The Great Western Railway Company.

The cause came on to be tried, before Wilde, C. J., at the Sittings for London after Michaelmas term, 1849, when a verdict was entered by consent for the plaintiffs; debt 10,000*l.*, and damages 2000*l.*, subject to a special case to be settled by an arbitrator, to whom the cause and all matters in difference between the parties were submitted, and who was empowered to direct for what amount the verdict should be entered.

The particulars of demand stated that the action was brought to recover 6,320*l.* 7*s.* 7*d.*, for moneys overcharged by the defendants and paid to them by Parker, and discounts due and refused to be allowed in respect of goods carried by the defendants for Parker between May 1844 and May 1846, and that the plaintiffs would claim interest from the time when the respective sums had been paid until payment.

The case stated by the arbitrator commenced with averments similar to those in the preceding case of *Parker v. The Great Western Railway Company*. It then set out sections 163, 166, 167, 171, 174, and 175, of the 5 & 6 Will. 4, c. 107, (*ante*, p. 436,) the company's act, the 44th section of 7 Will. 4, and 1 Vict. c. 192, (*ante*, p. 437,) and the 50th section of the 7 & 8 Vict. c. 3, (*ante*, p. 437.) It also set out the 2 & 3 Vict. c. 37, s. 24,¹ and the 48th and 49th sections of the 7 & 8 Vict. c. 3.² Furthermore, the case set out the provisions of different statutes relating to the Bristol and Exeter Railway, the last of which, 4 & 5 Vict. c. 41, put so much of that railway as should be under lease to the Great Western Company on the same footing as to the management of traffic and working as the Great Western Company. The case then proceeded to state that the Great Western Company

¹ The 2 & 3 Vict. c. 27, which recited the above-mentioned acts, by sect. 24, enacted "that the charges by the said acts or either of them, authorized to be made for the carriage of any passenger, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, should be at all times charged equally to all persons, and after the same rate per mile in respect of all passengers and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line, and no reduction or advance in any charge for the conveyance by the said company, or for the use of any locomotive power to be supplied by them, should be made either directly or indirectly in favor of or against any particular company or person travelling upon or using the same portion of the said railway."

² The 7 & 8 Vict. c. 3, which passed on the 10th of May, 1844, by the 48th section, after reciting the 175th section of the 5 & 6 Will. 4, c. 107, as to charging the rates and tolls equally, and the 24th section of 2 & 3 Vict. c. 27, as to charging the carriage-charges equally, and referring to certain sections on similar subjects in the acts relating to the Cheltenham and Great Western Union Railway and the Oxford Railway, and further reciting that it was expedient that such provisions as to the Great Western and the other two railways should be amended, and the provisions applicable to the three should be assimilated, repealed the said provisions.

Section 49 enacted, "That all tolls for the use of the said Great Western Railway (comprising the said Cheltenham and Great Western Union Railway and the said Oxford Railway, &c.) shall be at all times charged equally to all persons and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all passengers and all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing along the same portion of and over the same distance along the said railways or either of them; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person."

opened so much of its railway and branches as is material, before May, 1844, and were common carriers thereon, and on the Bristol and Exeter Railway during the years 1844, 1845, and 1846, and that both railways and branches were to be treated as the Great Western Railway. The Great Western Company, during the period in question, were the only carriers on the railway, and if any other carrier wanted goods carried he was obliged to employ the company for that purpose. From 1841 till his bankruptcy, Parker continually employed the company, and was the largest carrier on the line. During the time to which the case related, other carriers and the public at large employed the defendants, and the dealing between them and Parker was the same as between them and other carriers. The regulations of the company as to ticking-off notes, and the delivery of goods by and to Parker or his agents at the company's stations, were then stated, as in the former case. The company treated Parker as consignor and consignee, but required to be informed by the ticking-off notes of the names and addresses of the ultimate consignees, which were generally written also on the packages. Scales of charges fixed by the company for the carriage of goods were published in printed bills from time to time. The scale-bill A, referred to in the case, came into operation at the commencement of the time to which the case referred, and so continued till the 24th of March, 1845, when bill B came into operation in its stead, and remained in operation till the end of the time. The first scale of charges in each of the bills was commonly called the "parcels" scale; the second, the "tonnage" scale. In bill A, the first scale was "for all goods or merchandise packages up to 2 cwt., exclusive of charges for collection or delivery." The second scale was "for goods above 2 cwt. being aggregate of one kind according to the following classes," &c. There were six classes mentioned, specifying different kinds of goods in each. The fifth class included, among other things, "meat, fish, poultry, fresh butter," &c., "which will be charged 50 per cent. on the weight." &c. The sixth class consisted of "miscellaneous goods, *not being aggregate of one kind or class*," for which, in addition to the above scale, a charge "of 2d. on each package or article up to 2 cwt. will be made." In bill B, the first scale of charges was "for packages up to 3 cwt. in the various classes, above which weight the charges will be calculated at the tonnage rate." Five classes were there mentioned. The second class contained, among other things, bacon and lard. The fourth, which included meat and fresh butter, was chargeable with 50 per cent. additional on the weight of the articles. In the fifth, which consisted of "miscellaneous goods, *not being aggregate of one kind or class*," an additional charge was made of 2d. on each package or article up to 2 cwt. Any deviation from these bills was unauthorized by any formal sanction of the directors, but they were from time to time informed of the charges of which Parker complained, and assented to them. The expression "aggregate of one kind or class" in the bills, was stated to have no technical meaning. During the operation of bill A for six weeks, from the 1st of May, 1844, any one of the public, not a carrier, who sent several packages containing different

Edwards v. The Great Western Railway Company.

kinds of goods, singly not exceeding 2 cwt., but which taken together exceeded that weight, or were accompanied by a large package of a different kind, from the same person, was charged for them according to the tonnage scale as miscellaneous, or belonging to class six, at the highest tonnage rate, with an addition of 2*d.* a parcel; so, during the same period, if one package not exceeding 2 cwt. was sent, together with another of a different kind exceeding that weight, the smaller package was charged at the miscellaneous rate. If several packages all of the same kind sent together exceeded 2 cwt., they were all charged as one package at the rate of the class to which from the nature of the goods they belonged. After the expiration of six weeks from the 1st of May, 1844, bill A being still in operation, the miscellaneous class was not applied to the public other than carriers, but the public were charged for the whole of the packages together, either at the rate of the class to which the whole or the principal part belonged, or on a rough average of the classes. But when Parker or any other carrier sent several packages singly, not exceeding 2 cwt., but which, taken collectively, exceeded that weight, or were accompanied by any larger package sent by him, he was charged for them according to the tonnage scale as miscellaneous, or belonging to the sixth class, without reference to the nature of the goods or the class to which each individual package might belong. If, however, two or more of the packages carried for Parker were for the same ultimate consignee, then such packages were charged as miscellaneous or otherwise, according to the same circumstances as would have regulated the charges had they been carried for any one of the public not a carrier, during the six weeks when the miscellaneous class was applied to the public. In a similar way, while bill B was in operation, if any of the public other than a carrier sent at the same time several packages of goods singly, not exceeding 3 cwt., but which accompanied some larger package, or which collectively exceeded the weight of 3 cwt., such packages were charged as belonging to one of the first four classes. But when Parker or any other carrier sent such packages, he was charged for them according to the tonnage scale as miscellaneous, or belonging to the fifth class, and this without reference to the nature of the goods. If, however, any two or more packages sent at the same time by Parker or any other carrier were going to the same ultimate consignee, and their joint weights exceeded 3 cwt., they were not necessarily charged as of the miscellaneous class, but as of that class to which from the nature of the goods they would belong, as if they had been sent by the consignee himself without the intervention of a carrier. The miscellaneous class in bill B was never applied to the public at large. This mode of charging gave rise to the first and second heads of claim after mentioned in the case. The charge of the miscellaneous or highest class rate for goods sent by carriers was extended in many cases to packages exceeding 2 cwt. and 3 cwt., but not exceeding 500 pounds. During the time bill A was in operation, such charge was made on every package which, taken by itself, did not exceed the weight of 500 pounds, though exceeding 2 cwt., if it was unaccompanied by a package of the same kind going

to the same ultimate consignee. Hence arose the third head of claim afterwards mentioned. A somewhat similar distinction between the public and carriers was also made with respect to goods falling within the "parcels" scale, that is, with respect to packages which collectively did not exceed 2 cwt. and 3 cwt. respectively when bills A and B were respectively in operation, and which were unaccompanied by any larger package. During the six weeks beginning the 1st of May, 1844, any one of the public was simply charged on the aggregate weight of the packages the amount indicated by the "parcels" scale, and he was charged 2*d.* a package in addition if the packages were of a different kind; but with regard to a carrier, if the packages, whether of the same or of different kinds, were going to different ultimate consignees, he was charged the additional 2*d.* a package as well after as during the six weeks in question. This was whilst bill A was in operation, in which there is no division of the "parcels" scale into classes; but when bill B came into operation, the packages sent by a carrier, if going to different ultimate consignees, were, without reference to the class to which the particular goods might belong, charged at the rate of the highest class in the parcels scale with the addition of 2*d.* a package. The public, other than carriers, were not charged the 2*d.* a package; and the class of their goods was determined by the nature of the goods; and if they belonged to different classes, they were charged as belonging to the class of the principal part, or a rough average was taken. As Parker's goods, when they did not collectively exceed 3 cwt., during the time bill B was in operation, generally belonged to the fourth class in the "parcels" scale, the dispute between the parties with respect to goods falling under the parcels scale was confined to the charge of the additional 2*d.* a package. This constituted the fourth head of claim afterwards mentioned. When the company carried several packages, (whether of the weight in question, or any other weight,) which belonged to or were going to several different ultimate consignees, the company was put to no more trouble and expense than when the packages were going to one consignee. When tradesmen, not carriers, sent several packages to several customers, and paid the company's charges, the company never made any extra charge on account of risk. But in all cases where the packages were sent to several consignees, the tradesmen not paying the company's charges, such packages were charged separately, and not on the aggregate weight. The company's labor and expense in carrying several packages for different ultimate consignees were no greater with respect to carriers than with respect to other persons. The carriers were not mere customers, but rivals of the company. The carriers afforded the company in loading and unloading much greater assistance than others not carriers. During the period in question, Parker made frequent complaints of the charges being excessive, unequal, and illegal, and paid them under protest, demanding that they should be charged in the respective classes to which they belonged at the tonnage rate, and demanding a discount of 10 per cent. Parker became a bankrupt in March, 1847, and a fiat issued against him on the 8th, under which the plaintiffs were ap-

Edwards v. The Great Western Railway Company.

pointed assignees of his estate. One month before this action was brought, notice of action was served on the company by the plaintiffs. The notice of action and particulars of demand were sufficient in respect of the alleged overcharges set forth in the first four heads of claim, but contained no claim of interest such as was claimed under the fifth head.

The case then set out the different heads of claim to the following effect:—

First head of claim—1. On the 1st of May, 1844, before the passing of 7 & 8 Vict. c. 3, bill A then being in operation, and the miscellaneous class being applied to the public, Parker delivered to the company packages of goods weighing altogether 18 cwt. 3 qrs. 9 lbs., accompanied by the usual ticking-off note, which was as follows:—

Name of consignee and residence.	Description of packages, &c.	Contents.	Cwt.	qrs.	lb.
Bonsor, Newgate Market,	1 Hamper,	Meat.	1	3	23
Bonsor, do.	1 Hamper,	Meat.	4	0	15
Bonsor, do.	1 Hamper,	Meat.	0	3	0
Bonsor, do.	1 Hamper,	Meat.	3	1	5
Frost & Co., do.	1 Hamper,	Meat.	2	0	0
Bonsor, do.	1 Hamper,	Meat.	5	1	10
Coles, London,	Cloth,	Meat.	1	1	12
			18	3	9

The above goods were delivered at the same time to be carried together by the company, and to be delivered to Parker. The company received and carried such goods accordingly, and charged Parker 2*l.* 5*s.* 11*d.*, which he paid under protest, and was obliged to pay in order to procure the carriage and delivery.

The plaintiffs contended that Parker was entitled to have the above goods charged at the aggregate weight, the rate of the fifth class of goods in the tonnage scale of bill A, in which class meat is specified, and which rate for the journey was 48*s.* a ton, and the amount would then have been 2*l.* 5*s.* 2*d.*, and the plaintiffs alleged the difference between that sum and 2*l.* 5*s.* 11*d.* to be an overcharge. The company contended that they were not bound to charge these goods on the aggregate weight, owing to the character of the goods themselves; and, independently of other objections to such obligation, they alleged that, except where the weight of several packages of the same kind of goods, going to some one ultimate consignee, exceeded 2 cwt., the goods being sent by a carrier were to be charged in the miscellaneous class, and accordingly that the company had a right to charge as they had charged, 2*l.* 5*s.* 11*d.*, which was made up thus:—

Meat (including all that was going to Bonsor,) 15 cwt. 1 qr. 25 lbs. at the	£.	s.	d.
fifth class rate, or 48 <i>s.</i> a ton,	1	17	4
Miscellaneous, 3 cwt. 1 qr. 12 lb. at sixth class rate, or 52 <i>s.</i> a ton,	0	8	3
Two parcels at 2 <i>d.</i> each,	0	0	4
£2 5 11			

Edwards v. The Great Western Railway Company.

2. On the 2nd of January, 1845, after the passing of the 7 & 8 Vict. c. 3, bill A being then in operation, and the miscellaneous class *not* being applied to the public other than carriers, Parker delivered to the company in a similar way exactly similar goods, for which he paid similar charges under protest. The plaintiffs claimed to recover the overcharge as on the former occasion. The company justified their charge as before, and further contended that they were not limited as to the charge made to Parker or other carriers by the charges made to tradesmen or persons not carriers, as they alleged that the goods were not in such cases carried *under the like circumstances*.

3. On the 6th of May, 1844, before the passing of the 7 & 8 Vict. c. 3, bill A then being in operation, and the miscellaneous class being applied to the public, Parker delivered to the company packages of goods weighing altogether 3 cwt. 2 qrs. 4 lb., accompanied with the usual note, as follows:—

Name and address.	Description.	Contents.	Cwt. qrs. lb.		
Wilcox, Newgate Market,	1 Hamper,	Meat,	1	3	10
Jennings, do.	1 Hamper,	Meat,	1	0	22
Worley, do.	1 Flat,	Butter, fresh,	0	2	0
			3	2	4

The company charged Parker for carriage 4s. 9d., which he paid.

The plaintiffs contended that Parker was entitled to be charged in the aggregate weight at the rate of the fifth class in the tonnage scale of bill A, in which class both meat and fresh butter are specified, and which rate for the distance was 18s. a ton, at which rate the charge for the carriage of the goods would have been 3s. 2d. The company contended that they were not bound to charge these goods on their aggregate weight, both from the nature of the goods and as they were not of the same *kind*, and that, except when the weight of several packages of the same kind of goods going to some one ultimate consignee exceeded 2 cwt., the goods being sent by a carrier were to be charged in the miscellaneous class, and accordingly that the company had a right to charge, as they had charged, 4s. 9d., which was made up thus—

	s. d.
Miscellaneous, 3 cwt. 2 qrs. 4 lb. at sixth class or 18s. a ton, . . .	4 3
Three parcels at 2d. each,	0 6
	4 9

The company further contended, that, at all events, they were entitled to charge as much as 3s. 5d., which would have been the amount charged to any tradesman or other person not a carrier, had he sent the same goods on the same occasion to be carried by the company on the same journey, since the miscellaneous class was in May, 1844, applied to the public, who consequently would have been charged thus—

 Edwards v. The Great Western Railway Company.

	s.	d.
Meat, 3 cwt. 2 qrs. 4 lb. at fifth class or 18s. a ton,	2	9
Miscellaneous, 2 qrs. at sixth class or 24s. a ton,	0	8
	<hr/>	<hr/>
	3	5

4. On the 16th of May, 1844, *after* the passing of the 7 & 8 Vict. c. 3, bill A being then in operation, and the miscellaneous class being applied to the public, Parker delivered similar goods, and the company charged him the same. The company justified their charge as before, and further contended, that they were not limited, as to the charge made to Parker or other carriers, by the charge made to tradesmen or persons not carriers, as they alleged that the goods were not in such cases carried *under the like circumstances*.

5. On the 1st of July, 1844, *after* the passing of the 7 & 8 Vict. c. 3, bill A then being in operation, and the miscellaneous class *not* being applied to the public other than carriers, Parker delivered such goods to the company, who charged him the same sum as on former occasions, which he paid. The company justified their charge upon the same grounds as on the last previous occasion, except the partial justification arising out of the miscellaneous class being applied to the public at large.

During the whole of the time in which bill A was in operation, the company were constantly employed by tradesmen and other persons, not carriers, to carry goods for them on all parts of their railway. If on any of the occasions mentioned under this first head of claim, or any other similar occasion, the company had carried the same packages of goods as those respectively specified under this first head of claim, on the same journey for a tradesman or other person not a carrier, the respective charges for so doing, instead of 2*l.* 5*s.* 11*d.*, 2*l.* 5*s.* 11*d.*, 4*s.* 9*d.*, 4*s.* 9*d.* and 4*s.* 9*d.* (the respective sums charged to and paid by Parker,) would have been respectively 2*l.* 5*s.* 2*d.*, 2*l.* 5*s.* 2*d.*, 3*s.* 5*d.*, 3*s.* 5*d.* and 3*s.* 2*d.* only. And in such case, it would have made no difference whether in each instance the several packages were to be delivered to one consignee or to several consignees, provided such tradesmen or other person not a carrier had been the party charged with the carriage, but any other carrier would have been charged the same as Parker. The goods, whether carried for Parker or a tradesman or other person not a carrier, would have been conveyed in and propelled by a like carriage and engine, and would have passed only over the same portion of and over the same distance along the railway, and *under the like circumstances*, unless the fact of Parker being such carrier, and so carrying on his business as hereinafter mentioned, renders the circumstances unlike. The charges and mode of charge contended for by the plaintiff, under this first head of claim, were fair and reasonable when considered by themselves, and without reference to the charges and mode of charge adopted towards persons not carriers; and the charges and mode of charge adopted towards Parker were fair and reasonable, unless from the circumstances stated in this case they appear to have been otherwise. Each of the several alleged overcharges stated under this first head of claim

Edwards v. The Great Western Railway Company.

was an instance of a numerous class, out of which it was selected for the purpose of ascertaining the opinion of the court.

The first question for the opinion of the court was, whether the company were justified in charging Parker in the mode above stated, in the instances above stated, and if not, whether the mode of charge contended for by the plaintiffs, or what other mode of charge was the proper one, and whether the plaintiffs were entitled to receive the amounts above claimed as overcharges, or any, and, if any, what part thereof, and if they were so entitled, whether the same could be recovered in this action.

Second head of claim — 1. On the 24th of June, 1845, bill B being then in operation, Parker delivered goods to the company weighing altogether 11 cwt., accompanied by the usual ticking-off note, which was as follows :—

Names of Consignees and Residence.	Description of Packages.	Contents.	Cwt. qrs. lb.		
Raymond Barringer Ray	2 Bales	Bacon	4	1	0
	1 Bale	Do.	2	0	0
	2 Bales	Do.	4	3	0
			11	0	0

The company charged Parker 10*s.*, which he paid under protest. The plaintiffs contended that Parker was entitled to have the goods charged on the aggregate weight of 11 cwt., at the rate of the second class of goods in the tonnage scale of bill B, in which class bacon was specified, and which rate for the journey in question was 16*s.* a ton, and at which rate the charge for the carriage of the goods would have been 8*s.* 10*d.*; and the plaintiffs alleged the difference between that sum and 10*s.* to be an overcharge which they claimed to recover. On the other hand, the company contended that they were not bound to charge these goods on the aggregate weight, and that, except where the weight of the same kind of goods, going to some one ultimate consignee, exceeded 3 cwt., the goods being sent by a carrier were to be charged in the miscellaneous or fifth class, and accordingly that the company had a right to charge, as they had charged, 10*s.*, which was made up thus :—

Bacon, 9 cwt. at second class or 16 <i>s.</i> a ton	<i>s.</i> <i>d.</i> 7 2
Miscellaneous, 2 cwt. at fifth class or 28 <i>s.</i> a ton	2 10
	<hr/> 10 0

The company also contended that they were not limited as to the charge to carriers by the charge made to other persons not carriers, as they alleged that the goods were not in such cases carried under the *like circumstances*.

2. On the 22d of June, 1845, bill B being then in operation, Parker delivered goods weighing altogether 6 cwt. 1 qr. 26 lb., accompanied by this note :—

Edwards v. The Great Western Railway Company.

Name of Consignee and Residence.	Description of Packages, &c.	Contents.	Cwt. qrs. lb.		
Pawley	London	1 Keg	Fresh Butter	0	2 14
Bonsor	Do.	1 Hamper	Meat	2	3 24
Bonsor	Do.	1 Hamper	Do.	2	3 8
Channing	Do.	1 Basket	Fresh Butter	0	0 8
				6	1 26

The company charged Parker 14s. 3d. The plaintiffs contended that Parker was entitled to have the above goods charged on the aggregate weight of 6 cwt. 1 qr. 26 lb., at the rate of the fourth class of goods in the tonnage scale of the bill B, in which class meat and fresh butter are both specified, and which rate for the journey was 41s. a ton, at which rate the charge for the carriage of the goods would have been 13s. 4d., and the plaintiffs alleged the difference between that sum and 14s. 3d. to be an overcharge. The company contended that the goods were not of the same kind; and that, except where the weight of the same kind of goods, going to the same one ultimate consignee, exceeded 3 cwt., the goods being sent by a carrier were to be charged in the miscellaneous or fifth class, and accordingly that the company had a right to charge, as they have charged, 14s. 3d., which was made up thus:—

Meat (going to Bonsor) 5 cwt. 13 qrs. 4 lb. at fourth class or 41s. a ton	. 12 0
Miscellaneous, 2 qrs. 22 lb. at fifth class or 48s. a ton	. 1 11
Two parcels, at 2d. each	. 0 4
	14 3

The company also contended that the goods were not in such cases carried under the like circumstances, as when sent by the public.

During the whole of the time in which bill B was in operation, the company were employed by others than carriers to carry goods. If on any of the occasions mentioned under this second head of claim, or on any other occasion whilst the bill B was in operation, the company had carried the same packages of goods as those respectively specified under the second head of claim in the journey for a person not a carrier, the respective charges for so doing, instead of 10s. and 14s. 3d., (the respective sums charged to and paid by Parker,) would have been respectively 8s. 10d. and 13s. 4d. only; and in such cases it would have made no difference whether, in each instance, the several packages were to be delivered to one consignee or several consignees, provided such person, not a carrier, had been the party charged with the carriage. But any other carrier would have been charged the same as Parker. The goods, whether carried for Parker or a person not a carrier, would have been conveyed in a like carriage and under like circumstances, unless the fact of Parker being such carrier, and so carrying on his business as hereinafter mentioned, rendered the circumstances unlike. The charges and the mode of charge contended for by the plaintiffs, under this second head of claim, were fair and reasonable, unless from the circumstances stated in this case they appear to have been otherwise.

Edwards v. The Great Western Railway Company.

The second question for the opinion of the court was, whether the company were justified in charging Parker in the mode under the second head of claim above stated.

Third head. On the 22d of July, 1844, bill A then being in operation, Parker delivered goods weighing altogether 15 cwt. 1 qr. 4 lb., as follows :—

Name of Consignee and Residence.		Description of Packages, &c.	Contents.	Cwt. qrs. lb.		
Raymond	London	3 Bales	Bacon	5	3	0
Marriott	do.	4 Bales	Bacon	2	1	6
Marshall	do.	1 Bale	Bacon	2	2	12
Read & Son	do.	1 Bale	Bacon	2	1	14
Brewer	do.	1 Bale	Bacon	2	1	0
				15	1	4

The company charged Parker 1*l.* 2*s.* 8*d.* The plaintiffs contended that Parker was entitled to have the above goods charged the aggregate weight, at the rate of the third class of goods in the tonnage scale of the bill A, in which class bacon is specified, and which rate was 24*s.* a ton, and the charge for the carriage would have been 16*s.* 7*d.* The company contended that, except where the weight, going to some one ultimate consignee, exceeded 500 lb., the company were at liberty to charge the goods in the miscellaneous or sixth class, and that the circumstances were not alike, and accordingly the company had a right to charge, as they have charged, 1*l.* 2*s.* 8*d.*, which was made up thus :—

	£.	s.	d.
Bacon (the 3 bales going to Raymond, exceeding 500 lb., 5 cwt. 3 qrs. at third class rate, or 20 <i>s.</i> per ton)		0	6 0
Miscellaneous 9 cwt. 2 qrs. 4 lb. at sixth class, or 35 <i>s.</i> per ton		0	16 8
	£1	2	8

2. On the 26th of November, 1844, bill A being then in operation, Parker delivered to the company a cask of lard, weighing 4 cwt., with other goods weighing upwards of 500 lb., to be carried on the railway from C. to P. The company charged Parker for carrying the cask of lard (the charges for the other goods being unimportant with reference to this head) 7*s.*, which he paid under protest.

The plaintiffs contended that Parker was entitled to have the lard charged at the rate of the third class of goods in the tonnage scale—bill A, in which class lard was specified, which rate for the journey in question was 21*s.* a ton, and at which rate the charge for the carriage of the lard would have been 4*s.* 3*d.* The company contended that the weight of the package being under 500 lb., they had a right to include it among the miscellaneous goods, and to charge it, at the rate of the sixth class, 7*s.*, and that the goods were not carried under like circumstances.

3. On the 26th of December, 1844, the bill A then being in operation, Parker delivered to the company a single hamper of meat, weighing 4 cwt. 0 qrs. 22 lb., as follows :—

Edwards v. The Great Western Railway Company.

Name of Consignee and Residence.	Description of Packages, &c.	Contents.	Cwt. qrs. lb.
Matthews Newgate Market	1 Hamper	Meat	4 0 22

The company charged Parker 10s. 7d. The plaintiffs contended that Parker was entitled to have the hamper of meat charged at the rate of the fifth class of goods in the tonnage scale, which rate for the journey in question was 45s. a ton, and at which rate the charge for the carriage would have been 9s. 7d. The company contended that the weight of this package being 500 lb., they had a right to charge it at the rate of the sixth class, according to which the charge was 10s. 7d., which they had charged, and that they were not carried under the like circumstances.

During the whole of the time in which bill A was in operation, the company were employed by others than carriers to carry goods. If on the occasions mentioned under this third head of claim, or on any other similar occasions whilst bill A was in operation, the company had carried the same goods on the same journeys for a person not a carrier, the charge for so carrying the packages first specified under this head of claim, instead of 1l. 2s. 8d., would have been 16s. 7d. only; and the charge for so carrying the lard would, instead of 7s., (the sum charged to and paid by Parker,) have been 4s. 3d. only, and in such case, provided a person not a carrier was the party charged with the carriage, it would have made no difference whether in each instance the packages were to be delivered to the same consignee or to different consignees; the charge for the hamper of meat, instead of 10s. 7d., (the sum paid by Parker,) would have been 9s. 7d. only. Any other carrier would have been charged the same as Parker. The goods, whether carried for any other person or for Parker, would have been conveyed in a like carriage and under the like circumstances, unless the fact of Parker being such carrier and so carrying on his business as herein mentioned rendered the circumstances unlike. The charges and the mode of charge contended for by the plaintiffs under this third head of claim were fair and reasonable considered by themselves, without reference to the charges and statements contained in the bill A, and to the charges towards persons who were not carriers; and the charges made and contended for by the company, as stated under this third head of claim, were fair and reasonable, unless from the circumstances stated in this case they appear to have been otherwise. Each of the alleged overcharges under this head of claim was selected for the purpose of ascertaining the opinion of this court.

The third question for the opinion of this court was, whether the company were justified in the instances stated under this third head of claim in charging Parker in the above mode.

Fourth head of claim — 1. On the 14th of May, 1844, bill A then being in operation, Parker delivered goods weighing 1 cwt. 2 qrs. 14 lb. as follows:—

Edwards v. The Great Western Railway Company.

Name and address.	Description and Contents.	Cwt. qrs. lb.
Johnson & Co. H Goppin Courtney	1 Paper 1 Box 1 Basket	0 0 14
		0 3 8
		0 2 20
		1 2 14

The company charged Parker 5*s.* 11*d.*, which he paid under protest. The charge was composed of 5*s.* 5*d.*, being the amount payable upon the aggregate weight of 1 cwt. 2 qrs. 14 lb. according to the parcels scale in bill A, with the addition of 2*d.* for each of the three packages. The plaintiffs contended that bill A does not warrant any charge beyond the sums stated in the parcels scale, and that the additional 2*d.* for each package was an overcharge. On the other hand, the company contended that they were at liberty to charge the 5*s.* 11*d.*, because they alleged (as was the fact) that it amounted to less than the charge stated in the parcels scale would amount to if each package were charged separately by that scale, without any additional charge for such package; and also, that as the packages were of different kinds, and were going to different consignees, the company had a right to treat them as miscellaneous goods, and to charge 2*d.* a package over and above the charge stated in the parcels scale, especially as the goods were of different kinds; the same charge would at the time have been made to persons not carriers.

2. On the 27th of June, 1844, bill A being then in operation, Parker delivered to the company packages of goods. The company charged him the same sum as on the last occasion, which he paid, as then, under protest. The plaintiffs claimed to recover the same overcharges, &c. The company justified the charge as on the former occasion, except so far as the justification was founded on the charge being the same to persons not carriers, and that they were not limited as to the charge made to carriers by the charge made to other persons, as they alleged that the goods were not in such cases carried under the like circumstances.

3. On the 11th of July, 1845, the bill B being then in operation, Parker delivered goods weighing 1 cwt. 2 qrs. 20 lb., as follows:—

Name of Consignee and Residence.	Description of Packages, &c.	Contents.	Cwt. qrs. lb.
Hawkes	Reading	1 Basket	0 1 10
Dawes	do.	1 Box	0 2 24
Tanner	do.	1 Truss	0 2 14
			1 2 20

The company charged Parker 1*s.* 9*d.*, which he paid under protest. The charge was composed of 1*s.* 3*d.*, being the amount payable upon the aggregate weight of 1 cwt. 2 qrs. 20 lb., according to the highest class of the parcels scale in the bill B, with the addition of 2*d.* for each of the three parcels.

Edwards v. The Great Western Railway Company.

The plaintiffs contended that bill B did not warrant any charge beyond the sums stated in the parcels scale, and that the additional 2*d.* for each package was an overcharge. On the other hand, the company contended that they were at liberty to charge 1*s.* 9*d.*, because they alleged (as was the fact) that it was a less sum than that to which the charges stated in the parcels scale would amount if each package were charged separately by that scale, without any additional charge for each package, and that as the packages were going to different consignees, the company had a right to treat them as miscellaneous, and to charge 2*d.* a package over and above the charge stated in the parcels scale. The parcels scale in both bills were so constructed, that in the great majority of cases the charge if made on each package separately according to those scales, without any addition, would exceed the amount of charge made according to those scales on the aggregate weight of the packages. But the company, whilst bills A and B were in operation, charged all persons upon the aggregate weight of their packages falling within the parcels scale, and not upon each package separately. During the whole time bills A and B were in operation, the company were employed by persons not carriers to carry goods for them; if the company had carried packages of goods such as those specified under this fourth head of claim on the same journeys for a person not a carrier, the charge for so doing would have been the same as that charged to Parker, the charge for miscellaneous goods being applied to the public at large as well as to carriers during May, 1844; but the charges for the carriage of such packages in the other instances under this head would have been less than the sums charged to and paid by Parker by the amounts of 2*d.* a package so claimed by the plaintiffs as overcharges, which charge would not have been made to persons other than carriers. And in such cases it would have made no difference whether the packages were to be delivered to one consignee or to several, provided such person not a carrier had been the party charged with the carriage; but any other carrier would have been charged the same as Parker. The goods, whether carried for Parker or for any other person not a carrier, would have been conveyed by a like carriage, and under the like circumstances, unless the fact of Parker being such carrier and so carrying on his business rendered the circumstances unlike. The charge and mode of charge contended for by the plaintiffs under this fourth head of claim were fair and reasonable considered by themselves, unless from the circumstances stated they appear to have been otherwise. Each of the alleged overcharges was of a class selected for the opinion of the court.

The fourth question for the opinion of the court was, whether the company were justified in charging Parker the sums of 2*d.* a package; and if not, whether the same could be recovered in this action.

The fifth head of claim was for a deduction from the company's charges, as a compensation for the weighing, loading, and unloading, or for so much thereof as was performed by Parker's men between the 1st of May, 1844, and the end of May, 1846. For some time

previous to 1844, the company were in the habit of allowing to the generality of carriers who employed them a discount of 10 per cent. off the amount of the company's printed charges, in consideration, among other things, of labor saved to the company by the services of the carriers' men in loading and unloading.

This course of business continued until about the time when the judgment was given in the case of *Parker v. The Great Western Railway Company* in February, 1844. That judgment having decided that certain charges made by the company to carriers were illegal, the company altered their system of dealing with the carriers. They withdrew entirely the allowance of 10 per cent., forbade the carriers' men to do any part of the loading or unloading, and reviewed their scale of charges, reducing the rates, on an average, upwards of 10 per cent., except for packages not exceeding 500 lb., charged as miscellaneous, in the manner before stated, the miscellaneous class being then first introduced. This reduction was not confined to carriers, but extended to the public at large, to whom no discount had been allowed. These alterations came into operation on the 1st of May, 1844. The company had never, since the 30th of April, 1844, allowed the 10 per cent. or any discount to any carrier. They had in the preceding January entered into a special agreement with a carrier named Kent, which was to continue in force for a year; and by one of the terms of this agreement they were to make Kent an allowance of 10 per cent. upon their charges to him; but the company refused to act on this agreement after the 30th of April, 1844. Kent brought an action against the company for this refusal, and recovered 20*l.* 10*s.* damages for the non-payment of the allowance from the 1st of May, 1844, to the 1st of January, 1845, which, together with the costs, the company paid under legal compulsion: and after Kent had brought a second action for subsequent breaches, the company paid him a considerable sum to be entirely released from the agreement and all claims under it. The company never, after the 30th of April, 1844, made any other payment or allowance which could in any way be regarded as the payment or allowance of the carriers' discount of 10 per cent. From the 1st of May, 1844, until after May, 1846, the carriers in general, and Parker among others, filled up the ticking-off notes as described in the early part of this case, and delivered them with the goods. Parker's men (as did those of other carriers) attended at the station at the times of departures and arrivals of the goods trains, but their services were usually confined to unloading Parker's wagons, and delivering the goods to the company's men, and receiving the goods from the company's men and loading them on Parker's wagons. The company never sanctioned any deviations from this course, except on certain occasions when meat used to arrive at the Paddington station in large quantities from the country for the carriers, and especially for Parker, whose business was particularly extensive in the meat department. On those occasions, which were termed "the meat mornings," (being the mornings of Friday and Saturday in each week,) Parker's men used, in addition to their other work, to enter the railway trucks and do the principal part of the un-

Edwards v. The Great Western Railway Company.

loading the meat from those trucks and the carrying it to Parker's carts, and several extra men in Parker's employ attended for this purpose on the "meat mornings." This was done with the sanction of the company, who, without such assistance, would not have been able to deliver the meat within a reasonable time. The attendance and services of Parker's and the carriers' men at the station was a matter of mutual convenience to the company and the carriers. It was essential to the success of the carriers' business that they should always have their goods delivered earlier than could be reasonably required of the company, without a far greater degree of assistance from the carriers than the company were in the habit of receiving from the rest of the public. On the other hand, those services tended on all occasions to the general despatch of the company's business, and on "meat mornings" enabled them to sustain the extra pressure without an increase of hands. The company were, during the time in question, saved considerable labor and expense from the weights being filled up in the ticking-off notes. But the filling-up of these notes imposed upon Parker's men no appreciable increase of labor or expense, as he must, for the purposes of his own business, have weighed the goods and taken an account of the particulars of the several packages. It was taken by Parker and the carriers as a general rule that the weights must be filled up in order to secure the carriage of the goods. When any of the goods have been weighed at the stations, such weighing has always been done by the company's servants. Parker was ready and willing during the whole time in question, and the company had notice of such readiness and willingness, to do the whole of the loading and unloading as above defined. He never refused to have his men in attendance, or required the company to do the work done by his men, or demanded of the company to do any of the loading, unloading, or weighing. No request was ever made on the part of the company that Parker's men should attend or do the work done by them, but their services were rendered and accepted without objection on the one side, and without solicitation on the other. The company made no separate charges to any person during the period in question for weighing, loading, or unloading; the charges for carriage being considered by them sufficient to provide for any ordinary trouble or expense to which they might be put in weighing, loading, and unloading. Parker paid all the charges for the carriage of goods carried for him by the company during the period in question under a protest. He was obliged to pay such charges in order to procure the carriage and delivery of the goods. The plaintiffs contended that they were entitled to recover as overcharges so much of 10 per cent. on the said charges for carriage as was equal to the expenses incurred by Parker, or, at all events, to such as were incurred by him on "meat mornings" in doing the work which properly belonged to the company's men.

The fifth question for the opinion of the court was, whether the plaintiffs were entitled to recover, and if they were entitled to do so in this action.

Edwards v. The Great Western Railway Company.

Last head of claim. On the 10th of February, 1848, and before the commencement of this present action, but after the notice thereof, the plaintiffs served on the company a demand in writing bearing date the 8th of February, 1848, whereby they demanded payment of the money alleged in the notice of action to be due to them, and claimed interest thereon from the date of that demand until payment.

The plaintiffs now contended that they were entitled to recover such interest, not exceeding the rate of 5*l.* per cent. per annum, from the 10th of February, 1848, as the arbitrator might think proper to allow on all such sums as are recoverable by them under the foregoing heads of claim. The company contended that the plaintiffs' claims, if recoverable at all, were not such debts or sums certain as to warrant a jury or the arbitrator in giving interest on them, and also that interest was not recoverable, because not included in the notice of action. The last question for the court was, whether, in addition to other sums the plaintiffs were entitled to recover interest thereon, if the arbitrator should think the case a proper one for giving interest.

The court was to be at liberty throughout the case to draw inferences of fact, and after its decision the arbitrator was to ascertain the amount.

Byles, Serjt., (with whom was *J. Brown*.) for the plaintiffs.¹ [He went through the different branches of the claims *seriatim*.] With regard to those branches of claim in the first four heads of claim referring to transactions which took place before the act of 7 & 8 Vict. c. 3, it is submitted that as the arbitrator has found in the case that the public would have been charged less than Parker was, he is entitled to recover the overcharge in this action, according to the decision in *Parker v. The Great Western Railway Company*, 7 Man. & G. 253; s. c. 13 Law J. Rep. (N. S.) C. P. 105. That case referred to similar transactions before the passing of the 7 & 8 Vict. c. 3, and Tindal, C. J., in giving judgment there said, "From these several enactments, it appears clearly to have been the intention of the legislature that the parties incorporated (the defendants) should be empowered to construct the railway, and hold it as their property and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed in the act; and that the payment to be made for such uses, whether under the denomination of rates or tolls or charges fixed by the company, should be reasonable and equal to all persons, without reference to the particular advantage to be derived by any individual, or class of individuals, from such use." Again, the Lord Chief Justice said, "It appears to us that the company are obliged to treat the plaintiff as consignor and consignee for all purposes, including the mode of charging in the aggregate; and that they have no right to

¹ November 8, before JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.

Edwards v. The Great Western Railway Company.

make a distinction in that respect between him and any other individual member of the public." With regard to the branches of claim under the first four heads, which arose after the 7 & 8 Vict. c. 3, the defendants will contend that a change took place with respect to the relation of the railway company and carriers, inasmuch as the 50th section of that act, after repealing the 24th section of the 2 & 3 Vict. c. 27, which compelled the company to charge equally to all persons, enacted that the company might charge such sum (not exceeding certain limits) as they should think expedient, provided that the charges should be made equally to all passengers and to all persons in respect of goods, &c., of a like description and quantity, and conveyed by a like carriage over the same portion of railway, and the same distance, *under the like circumstances*. It will be said that *Parker v. The Great Western Railway Company* having been decided on the 2 & 3 Vict. c. 27, does not apply to this portion of the claims, and that the carriers and the public are not *under the like circumstances*, within the 7 & 8 Vict. c. 3; but it is submitted that the unlike circumstances alluded to must be such as bear on the risk, trouble, and expense incurred by the company, and not merely on a difference of the persons who send the goods. This view is strengthened by the concluding clause of the 50th section of the act of the 7 & 8 Vict. c. 3, which provides that no reduction or advance on any charges should be made partially, either directly or indirectly, in favor of or against any particular company or person. As to certain claims under the first two heads, the company contend they have a right to place under the classes in the respective scale-bills, which contain miscellaneous packages, not being aggregate of one kind or class, goods which are of different "kinds" but of the same "class" in the bills; but it is submitted that the words mean goods either of one kind or of one class, and whether the goods be of one kind or not, yet if they are of one class in the scale-bills, they ought to be excluded from the miscellaneous class for which a higher rate is charged. With respect to the fifth head of claim, Parker was entitled to a deduction for the assistance which his servants lent to the company on "meat mornings," as they thereby enabled the company to do what otherwise they could not have done. In *Pickford v. The Grand Junction Canal Company*, 10 Mee. & W. 416, Alderson, B., speaking of the two carriers charged differently, asks, "Can it said that Pickford & Co. and Mr. Horne are charged equally when they are charged the same sum in one case for carriage *plus* portorage, and in the other case for carriage alone?" By the 7 Will. 4 & 1 Vict. c. 92, s. 44, the company is entitled to a reasonable charge for loading, unloading, and weighing. Again, under the fifth head, Parker was entitled to the same discount of 10 per cent. as Kent was, to whom a jury awarded the full amount of his claim under his agreement with the company. That was in fact an allowance of 10 per cent. which Parker, having a right to be charged equally with Kent, was entitled to claim. Had the jury given Kent less than the 10 per cent., then Parker would have been entitled to the same proportion as Kent recovered. The last head of claim is for interest. The question there

Edwards v. The Great Western Railway Company.

is, whether the case comes within the 3 & 4 Will. 4, c. 42, ss. 3 and 4, as the debt would certainly not bear interest without the aid of that statute. All that is necessary to bring the case within the statute is, that the debt should be certain, and that a demand of interest should be made in writing. Now each overcharge constituted a certain debt, for which an *indebitatus* action might have been brought, and there has been a sufficient demand of interest under the act. For these reasons, the plaintiffs are entitled to the judgment of the court.

Keating, (*Channell, Serjt., Hoggins*, and *Cripps* were with him,) for the defendants.

[The court intimated that he need not discuss the fifth head of claim; and he admitted as to those branches of the first four heads which occurred before the statute 7 & 8 Vict. c. 3, that the arbitrator having found that a distinction had been made between Parker and the company, the defendants were bound on those branches by the decision in *Parker v. The Great Western Railway Company*.]

After the passing of the 7 & 8 Vict. c. 3, the relation of the company to carriers using their railway was altered. After the decision of the first case, the company, conceiving that it was a hardship on them, if rival carriers could insist upon twenty packages assigned to twenty different persons being carried together in the lump, went to the legislature and got the 48th, 49th, and 50th sections of the 7 & 8 Vict. c. 3, enacted, for repealing the former provisions as to the mode of charging, and reënacting them, with the difference, that in the 50th section the new words "and under like circumstances" were introduced. Now the company contend that the fact of goods being sent by carriers carrying on their line for profit, renders their case different from that of the public, and prevents the circumstances of the two from being alike under the meaning of the act.

[JERVIS, C. J. The only difference that appears on the special case between carriers and the public is, that the carriers do not require the company to do so much as to loading, &c. as the public.]

With respect to the claims for overcharges arising from putting goods of different kinds within the miscellaneous classes, which are charged extra, the words of the scale-bills must be construed in conjunction with the 171st section of the 5 & 6 Will. 4, c. 107, which, authorizing the company to fix the charges for small parcels, excepts goods sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like. It must be taken that the words "aggregate of one kind or class," mean such aggregates as are mentioned in the statute, and therefore that "kind or class" really meant "kind."

[MAULE, J. The company say they meant to charge extra where things were put in the aggregate, which they would not have done but for the purpose of preventing as much as possible such things as a man putting in drapery and meat and metals together. Suppose a man made up a hamper of hardware, consisting of various different articles, or suppose a wholesale dealer in drugs sent to a retail one in the country a hamper or package containing twenty different kinds of drugs,

Edwards v. The Great Western Railway Company.

that would be an aggregate of different kinds of goods ; and suppose such goods mixed with a draper's goods, the question is, what is the meaning of the company ? If they wish to impose an extra payment in respect of any particular character of goods, they ought to express it distinctly, and I doubt much whether they have done so ; because in order to say that they have, it is necessary to throw overboard the word "class."

JERVIS, C. J. The company construe the words in one way with respect to carriers, and in another way with respect to the public.

MAULE, J. The company may have some reason for what they do. Is it not done for the purpose of saving a great deal of trouble in conveying the parcels, as well as in receiving and weighing them ? There is also the delivering of the parcels, and there is perhaps some increase of trouble in that. But the increase is mainly where they have to weigh them separately. It is more convenient that they should charge by the ton ; but when they charge differently, if twice the time is occupied in weighing, that time must be paid for. That being the principle, will it not satisfy the words and the reason of the thing to hold that when things are of the same class in respect of what is very material, that is, if there is a quantity of things which pay the same rate of tonnage that are to be weighed together, then they should not be charged an additional sum, but if they are things which are not of the same class or kind in that respect which is interesting to carriers, namely, the rate at which they are to pay — if they are things which would not necessarily be weighed together — then they are to be taken to be within the sixth class, and inasmuch as there is additional trouble about them, the company are to charge a certain sum, that is, 2*d.* a parcel, in addition ?]

J. Brown, in reply.

The court before giving judgment in this case, heard the argument and gave judgment in the preceding case of *Parker v. The Great Western Railway Company*.

November, 15th. The court being about to give judgment in this case —

J. Brown called attention to the fact that, as in this case all matters in difference were submitted, the ten per cent claimed under the fifth head might be given to the plaintiffs, even although it could not be recovered in an action for money received, if it could be recovered in any other form of action.

JERVIS, C. J., then delivered the judgment of the court. — There are only six heads of claim in this case ; each of the first four branching out into various different claims partaking of certain distinctions. But in substance the claims upon the first four heads are reduced to three. The first branch is of claims made for a period before the coming into operation of the act of the 7 & 8 Vict. c. 3, and that is disposed of, as was admitted in the course of the argument, by the

Edwards v. The Great Western Railway Company.

finding of the arbitrator, because he finds that in respect of the various claims or heads of claim under the first four claims, that certain scale-bills were in operation before the passing of the act of the 7 & 8 Vict. c. 3, and that the same class of goods would have been taken for the public for less than they were taken for Mr. Parker; that they were taken for the public for the price which Mr. Parker contends he ought to have paid; and that he paid the balance under protest. Now that being so, it was conceded in the course of the argument that that would bring the whole of these four cases under the distinct decision and the very language of *Parker v. The Great Western Railway Company*, which is binding on this court, being prior to the act of parliament; and, therefore, the plaintiff on this part of the case is entitled to the judgment of the court.

The second branch, which disposes also of the remainder of the heads with one single exception,—the first four heads of the different branches arising after the 7 & 8 Vict. c. 3, s. 50, are all the same as those prior to the act of parliament, with the single exception that that act of parliament in that section says this: the company shall have authority to charge such sum as they shall think expedient, provided they charge all persons equally in respect of all goods carried under the like circumstances. The arbitrator finds that the only difference of circumstances is the circumstance that Mr. Parker is a carrier, which the public are not, and that if the same goods under the same circumstances had been tendered by Mr. Parker, not being a carrier, the company would have carried them for a less sum, which is the sum Parker contends he ought to have paid, and he says that he ought not to have been charged the extra sum. The question, therefore, is whether the fact of Mr. Parker being a carrier is a different circumstance, or whether the goods are under different circumstances when they are carried for anybody else? Now, looking to the words of the 50th section, they are goods carried of the like quantity over the same portion of the railway, by the same power, and at the same time, and subject to the same liability; but because Mr. Parker is a carrier in London, the defendants say, "These are different circumstances, and, therefore, we are entitled to charge more." In the case of *Pickford v. The Grand Junction Canal Company*, it was decided that the fact of a person being a carrier makes no difference in the circumstances. The words of the act of parliament in that case were, "under the *same* circumstances," here they are "under the *like* circumstances," and I think the decision of *Pickford v. The Grand Junction Canal Company* is binding in this case.

But under the first two claims there is another point which arises. Under the sixth class the company have classed their goods by tonnage. Goods of a certain class, coming under the first, second, third, fourth, and fifth classes, may be goods composed of different kinds, but coming under any of those classes, and which, though they might have been charged as parcels, are charged by the first scale-bill as miscellaneous goods under the sixth class, which is a higher tonnage; and the company have by their construction of that class excluded the carriers, thereby making a difference between them and the pub-

lic, and, therefore, clearly under that head Mr. Parker would be entitled to recover. To do this, the company say, "‘kind and class’ in their scale-bill mean the same thing, and, therefore, in charging the public, we will put into the sixth class goods which are not goods of the same kind, though of the same class." In the course of the argument, it was pointed out by my Brother Maule what was the reason for the distinction — that they had the weighing and the trouble. "If they are all goods of one kind, we put them into one scale — if of different classes, then we will not weigh them separately, but weigh them altogether, and put them under the sixth class." Therefore, the word "class" is larger than the word "kind," and the company having restricted it to the more limited meaning of the word "kind," were wrong in charging at the rate of 3s. 6d., which is more than what they charged the public. They should have charged 3s. 2d., which the plaintiff contends ought to be charged, and we think he was right in that contention. I think those observations dispose of all the different branches or heads of the four first claims.

There is a fifth claim in which Mr. Parker says he is entitled to be allowed 10 per cent. or something less than 10 per cent. for the loading and unloading afforded by him during the "meat mornings." He puts that on two grounds. First, he says, "I have done work for you which the public did not do, and you did for the public, therefore I must charge you for it." The court are of opinion that he is not entitled to this claim, as was expressed in the former case. But further he says, "I am entitled to a reduction on the ground of inequality, because you entered into a contract with Mr. Kent to make him an allowance of 10 per cent. prior to the decision of *Parker v. The Great Western Railway Company*, and because you would not carry that into effect you paid him damages in the action amounting to 500l. In truth, you have been making him, through the intervention of a jury, an allowance, and, therefore, upon the principle of *Parker v. The Great Western Railway Company* you ought make me an allowance." The answer to that is, that the company have paid Mr. Kent damages for not doing what they agreed. They have not made Mr. Kent an allowance, but they have paid him damages for a breach of contract. How then can Mr. Parker say, when they have not made the allowance to Mr. Kent, but have broken their contract because they would not be unequal, that therefore they are bound to make him the same allowance? It is in truth an action for not doing the very thing which Mr. Parker says they did do.

Then the only remaining question is this: is the arbitrator authorized if he thinks fit (which does not enter into the question whether he ought or ought not to do so) to give interest? That depends upon the construction of the recent statute. Mr. Parker contends that he has been paying from the commencement a sum certain in excess upon every charge. There is a demand in writing of the debt, and a demand of interest under the act of parliament, and, therefore, there is a sum certain with respect to which the demand has been made for principal and interest, and the arbitrator may, if he thinks fit, give interest. But it is said he cannot do that here, because the

Harrison v. The Great Northern Railway Company.

act of parliament entitles the company to have notice of action, and the notice of action does not demand interest, and, therefore, he cannot give it. There are two answers to this,—one answer is, that there is no plea of want of notice of action, there being only a plea of “never indebted by statute,” which is repealed by Sir Frederick Pollock’s act. They have no right to plead a general plea. They must plead specially “no notice of action.” The further answer would be that this is a submission not only of the action but of the matters in difference, whether there was a demand of interest in the notice of action or not. If the arbitrator could give it, he might give it in that way notwithstanding. On these grounds we are of opinion that this case may be shortly disposed of, for it being admitted in the course of the argument that the matter turns on the distinction I have pointed out, we are precluded from any further argument by the finding of the arbitrator upon the different heads.

Judgment accordingly.

HARRISON & others v. THE GREAT NORTHERN RAILWAY COMPANY.¹

January 26, 1852.

Covenant—Contract of Company—Discretion of Engineer—Pleading—Readiness and Willingness.

The defendants, a railway company, by a deed containing several stipulations, covenanted to pay the plaintiffs, contractors, “for and in respect of the said sleepers hereinbefore contracted to be supplied, at the rate of 4s. 3d. per sleeper.” The preceding part of the deed, after reciting that the defendants were desirous of being supplied with 350,000 sleepers, and that the plaintiffs were willing to supply the said 350,000 sleepers mentioned in the specification annexed, contained a covenant by the plaintiffs within the time and at the place mentioned in the specification, as and where, and in such quantities, and in such manner as one of the engineers of the company should from time to time or at any time within the period limited by the specification require or direct, to supply the said company with 350,000 sleepers of the description mentioned in the specification. The deed also contained certain provisions giving the engineers of the company a discretion to alter the shape of the sleepers at any time before the complete execution of the contract by delivery of the whole 350,000, and to give notice when and in what number the sleepers were to be delivered, and to reject defective sleepers. The specification referred to in the deed, mentioned that the number required was 350,000 one half to be supplied in 1847, the other before midsummer 1848, and that the port of delivery was Goole. The company were empowered to retain in their hands the sum of 2,000*l.* out of the payments which were to be certified as due by the engineers, as a guaranty for the completion of the contract, until the whole 350,000 should have been supplied :—

Held, that this was a positive contract to take and pay for 350,000 sleepers, notwithstanding the discretion vested in the engineers to decide when and in what quantities the sleepers were to be delivered.

Held, also, that before they were bound to deliver any of the sleepers, the plaintiffs were entitled to notice when and in what quantities they were to be delivered; and that a declaration, which stated that the plaintiffs were always ready and willing to deliver the sleepers,

¹ 21 Law J. Rep. (N. S.) C. P. 89.

Harrison v. The Great Northern Railway Company.

according to the specification, when and in such quantities as any of the engineers of the company should require, but that the company's engineers gave no requisition within the times during which the sleepers were to be delivered, was good upon general demurrer.

COVENANT. The declaration set out an indenture between the plaintiffs and the defendants, which, after reciting that the defendants were desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber, and that the particular size and description of the said sleepers were set forth in the specification annexed, and in certain drawings therein referred to, and that in the same specification were also set forth the several times within which, and the port at which, the same sleepers would be required to be delivered, and that the plaintiffs were willing to supply the said company with the said 350,000 sleepers upon the terms mentioned in the said specification, and in the tender of the plaintiffs, a copy of which was thereunder written, and to enter into the several covenants and agreements thereafter contained, proceeded as follows:—“This indenture witnesseth, that in consideration of the covenants and agreements hereinafter contained on the part of the said company to be observed and performed, they (the plaintiffs) do hereby covenant and contract with the Great Northern Railway Company in manner following, that is to say, that they, the said contractors, shall and will within the times and at the place mentioned in the said specification, as and when and in such quantities and in such manner as Joseph Cubitt, Esq., or John Miller, Esq., or other the principal engineer, or one of the principal engineers for the time being of the said company shall, by order or requisition in writing, under his hand, from time to time, or at any time within the period limited in and by such specification, direct or require, furnish and supply the said company with 350,000 sleepers of Dantzic or Memel timber; that such sleepers shall be of such description, quality, manufacture, and size, and of such form and construction as are mentioned in the said specification, and to be equal in all respects to the specimens deposited with the said Joseph Cubitt.” “That in case any of the principal engineers of the company shall, at any time before the complete execution of this contract, by the delivery of the whole number of 350,000 sleepers, be desirous of altering the size, form, or construction of, or of changing or varying the times of delivery of any of the said sleepers which shall not then have been delivered, he shall be at liberty so to do, and in such case a proportionate alteration in price shall be made, either by increasing or diminishing the price hereinafter agreed to be paid for such sleepers supplied by the contractors, and the engineer by whom such alteration shall be required shall settle whether any, and if any what, alteration in price shall be made. Provided always, that care shall be taken that the contractors shall derive the same proportionate amount of profit as they would have had if no such alteration had been required.” Then followed a power to the engineers to reject and require to be removed any unsound or defective sleepers, supplied by the contractors, and to order them to be replaced by proper sleepers, or to replace them at the cost of the contractors, “with such a number as will make up the full number hereinbefore agreed to be supplied,” and for the company to

Harrison v. The Great Northern Railway Company.

deduct the amount of purchase-money of new sleepers, and costs and damages incurred by refusal of contractors to remove and replace the defective ones "out of any moneys which shall be then due or may hereafter become due to the contractors by virtue of these presents." It was also stipulated, that if the contractors should not regularly deliver the sleepers in such quantities and at such times and places as were therein agreed upon, to the satisfaction of the engineers of the company, or be prevented, except by the company, from making such delivery for fifteen days after notice in writing, requiring them to put an end to such default, the said company might determine the contract by notice in writing, and reimburse themselves for damage caused by such default. The deed then contained a covenant as follows:—"That they, the said company, will pay the said contractors for the said sleepers hereinbefore contracted to be supplied, the the price of 4s. 3d. per sleeper, at the times and in manner hereinafter mentioned, namely, that when one of the engineers of the company shall have certified that a cargo of sleepers to the amount mentioned in his certificate has been delivered, and that the sum stated in the certificate is due, the company shall forthwith pay the said sum, with any deductions authorized to be made as before mentioned. And that the contractors shall be entitled to receive from the company within one month from the delivery of each cargo the amount of the moneys payable in respect thereof. Provided always, that no sum of money shall be claimed or received by the contractors on account of the sleepers so supplied until sleepers above the value of 2000*l.* shall have been delivered to, and certified to have been received by, the company, and that as soon as sleepers to the amount of 2000*l.* shall have been so delivered and certified, such sum of 2000*l.* shall not be paid to the contractors, but retained by the company, and the excess only of the value of sleepers supplied above 2000*l.* be from time to time paid to the contractors, to the end that the company may always have in hand 2000*l.* for the purpose of securing the due performance of this contract." This sum of 2000*l.* was to be paid within two months after the whole of the 350,000 sleepers "hereinbefore agreed to be supplied" should have been supplied and a certificate given.

The declaration then set out the specification referred to in the contract, in which the size and form and mode of cutting the sleepers were described. It contained the following passages:—"The number of sleepers required under this specification is 350,000; one half will have to be delivered in 1847, and the remainder by midsummer, 1848. The port at which the deliveries will have to be made is Goole." "The deliveries are to be made either by stacking the sleepers upon a wharf, or properly loading them into a boat or barge, or other vessel, as may be directed by the resident engineer." "Payments will be made monthly within one month of the date of the engineer's certificate of the delivery of each cargo, after sleepers to the amount of 2000*l.* shall have been delivered and certified, which sum of 2000*l.* shall remain in the hands of the company as a guaranty for the due performance."

Harrison v. The Great Northern Railway Company.

The declaration then stated that the year 1847 and the midsummer of 1848 had elapsed. That as to the 175,000 sleepers, the half to be supplied in 1847, the plaintiffs had fulfilled all things in the said indenture contained on their parts to be fulfilled in respect thereof, except so far as they were prevented by the defendants; and that they were always ready and willing within the time and at the place mentioned in the specification for the delivery of the said 175,000 sleepers, to wit, during 1847, at the said port of Goole, as and when and in such quantities as any of the engineers of the said company should direct or require, to supply the defendants with the said half of the said sleepers of Dantzic or Memel timber of such description, quality, manufacture, and size, and of such form and construction, as were mentioned in the said specification; yet that the said engineers did not, nor did any of them, during 1847, or at any time, make or give to the plaintiffs or any of them any order or requisition touching the said half of the said sleepers or any part thereof, or the delivery thereof, or the manner, time, or quantity, in which the said half or any part thereof was to be delivered, whereby the plaintiffs were wholly deprived of the profits they would otherwise have made by the delivery of, and payment for, the said half, &c., to wit, 20,000*l.*" Then followed a similar statement with regard to the 175,000 sleepers to be delivered by midsummer, 1848. Damages, 50,000*l.*

Several pleas were pleaded. To the fourth and seventh pleas was a general demurrer, which now came on to be argued.

Bovill, for the defendants, stated that he should contend that the declaration was bad; and not argue in support of the pleas.

January 15. *Willes*, for the plaintiff, (*Bramwell* with him.) The declaration is good. The contract which is set out is not a mere one-sided contract, empowering the defendants to compel the plaintiffs to supply them with any portion of the sleepers they choose to have, and to refuse to require more; but it contains a corresponding obligation on the part of the defendants to take the whole of the sleepers, and to inform the plaintiffs where, and how, and in what shape, and in what quantities they require them. Were it otherwise, the stipulation with regard to the 2000*l.* would enable the defendants to take a number of sleepers less in value than 2000*l.*, and never to pay at all; which could not have been intended. The covenant is express to pay for 350,000 sleepers, which is stated to be the number required to be supplied. The plaintiffs could not perform their contract unless they were from time to time told how and in what shape they were to deliver the sleepers. They could not be bound to cut up the timber into sleepers until they knew in what shape the engineers would require them. The company, therefore, were bound to order their engineers to give the proper requisition from time to time.

[*Jervis*, C. J. They would perhaps say that you were bound to deliver the sleepers without any orders.]

The declaration avers that the plaintiffs were ready and willing to

Harrison v. The Great Northern Railway Company.

deliver the sleepers according to the contract. They could not be bound actually to deliver them until they were told what kind of sleepers were required, and in what quantities. Looking at the whole of the deed, there is a covenant, implied if not expressed, to take 350,000 and pay for them.

Bovill, (*Byles*, *Serjt.*, and *Raymond* with him,) contra. The declaration is bad. The contract is not an uncommon one, to pay a price for all the sleepers the company require up to a certain number, but there is nothing to bind them to require that number. It is merely an engagement that under certain conditions, that is, provided sleepers are required by them, delivered by the plaintiffs and certified by the engineer, they shall be paid for at a certain price. But supposing that there is any positive binding agreement on the part of the defendants to take a certain number of sleepers, it is only an engagement to take them if supplied by the plaintiffs at the time and place mentioned; that is, in 1847, and by midsummer, 1848, at Goole. The words relied on by the other side as creating an implied covenant to cause the engineers to require the sleepers, are merely words put in for the benefit of the company, in order to enable them to have the sleepers within the times limited, inasmuch as without such a provision the plaintiffs would not have been bound to deliver the respective halves of the 350,000 sleepers until the last hour of the times mentioned. *Startup v. Macdonald*, 6 Man. & G. 593; s. c. 12 Law J. Rep. (N. S.) Exch. 477. Words of qualification are not to be construed as a covenant. *Wolveridge v. Steward*, 1 Cr. & M. 644; s. c. 3 Law J. Rep. Exch. 360. The deed set out in the declaration gives the engineer a discretion to certify or not, and to require sleepers or not, as he may think proper. That discretion overrides the whole contract, and is inconsistent with the supposed covenant on the part of the defendants to take a certain number. *Morgan v. Binnie*, 9 Bing. 672; *Worsley v. Wood*, 6 Term Rep. 710.

[WILLIAMS, J. There is a difference between the case in which the person who is to certify is made an arbitrator, and the case where he is a servant, to do some act which the company might order him to do.]

In this case several engineers of the company are contemplated, and the discretion may be exercised by any one of them. This is inconsistent with an express covenant that the sleepers shall be required. Com. Dig. tit. "Pleader," C. 47. He also cited *Aspdin v. Austin*, 5 Q. B. Rep. 671; s. c. 13 Law J. Rep. (N. S.) Q. B. 155, and *Dunn v. Sayles*, *Ibid.* 683; s. c. 13 Law J. Rep. (N. S.) Q. B. 159.

Willes, in reply, cited *Hartley v. Cummings*, 5 Com. B. Rep. 247; s. c. 17 Law J. Rep. (N. S.) C. P. 84, and *Pilkington v. Scott*, 15 Mee. & W. 657; s. c. 15 Law J. Rep. (N. S.) Exch. 329; and WILLIAMS, J., referred to *Wood v. The Copper Miners' Company*, 7 Com. B. Rep. 906; s. c. 18 Law J. Rep. (N. S.) C. P. 293. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court. It was ad-

Harrison v. The Great Northern Railway Company.

mitted upon the argument of this case, that the pleas could not be supported; but the learned counsel contended that the declaration was bad, and that the defendants were not liable; because the contract set forth in the declaration cast upon the defendants no obligation to take all the sleepers which the plaintiffs were bound to furnish; and because, if the defendants were bound to take all such sleepers, the plaintiffs were bound to deliver them at the times and places mentioned in the specification, without waiting for orders from the defendants' engineers. We have carefully considered the declaration, and are of opinion that it is good, and that upon both points the plaintiffs are entitled to our judgment.

To ascertain the true meaning of the parties, we must look at the contract and specification, which by reference form one instrument. The defendants covenant to pay the plaintiffs, "for and in respect of the said sleepers hereinbefore contracted to be supplied, at the price of 4s. 3d. per sleeper." What are the said sleepers thereinbefore contracted to be supplied? The plaintiffs say, "they are a fixed number of 350,000;" the defendants say, "they are so many as we may require of that number, at the discretion of our engineer and no more." An examination of the instrument will show that this view of the defendants cannot be supported. Before the contract was made, the defendants had ascertained the number of sleepers they should want, and accordingly in their specification said, "The number of sleepers required under the specification is 350,000." Upon this basis the contract was made. It recites that the defendants are desirous of being supplied with 350,000 sleepers, and that the plaintiffs are willing to supply the said 350,000 sleepers mentioned in the specification, and contains a covenant on the part of the plaintiffs to supply the defendants with 350,000 sleepers. With the same view, a discretion is given to the engineers of the company to alter the shape of the sleepers "at any time before the complete execution of the contract, by the delivery of the whole number of 350,000 sleepers;" and provision is made with reference to the payment for the sleepers which entitles the defendants to retain in their hands the sum of 2,000*l.* until two months after the whole of the said 350,000 sleepers agreed to be supplied by the contractors shall have been supplied. If the defendants were not bound to take the whole number, the event here contemplated might never arise; and the plaintiffs might, in that case, have supplied sleepers to the value of 2,000*l.* without the means of compelling payment for the same. Indeed, the parts of the contract referred to by the defendants' counsel, when taken in contrast with the rest of the instrument, show that the whole number of sleepers was to be taken. Much is left to the discretion of the defendants' engineers. They may say when and in what number the sleepers are to be delivered, within certain limits; they may alter the shape of the sleepers; they must examine and may reject those which are defective; they are to certify the number and value of those delivered, and they have in other respects various powers expressly conferred upon them. But although the discretion of the engineers is thus minutely and expressly defined, they have no power to say how

Justice v. Gosling.

many sleepers shall be delivered. The contract is not to supply so many sleepers as may be required by the engineers, not exceeding 350,000; but to supply the fixed number of 350,000, the number which the defendants say is required by the specification.

The second point is clear upon the face of the instrument. The defendants are bound to take, and the plaintiffs are bound to supply, 350,000 sleepers; but they are to be delivered within certain limits, as and when and in such quantities and in such manner as the engineer shall direct. The engineer has authority to alter the shape of the sleepers before the contract is completed, and the contractors are not bound, without notice, to have the sleepers cut in the shape specified, with the risk of having them thrown upon their hands, should the engineers think fit to alter the shape of the sleepers. The contractors could not have delivered half of the sleepers on the day of the execution of the deed, and the other half on the 1st of January, 1848. Such a delivery would have satisfied the precise words of the specification, but not the spirit of the contract, for in such case the engineers would not have had an opportunity of saying when and in what quantities and in what manner the sleepers should be delivered; they would not have had an opportunity of altering the shape of the sleepers if they had thought proper, and the plaintiffs would have forestalled the times of payment, which are to depend upon the deliveries as required by the engineers.

For these reasons we are of opinion that the defendants were bound to take the whole number of 350,000 sleepers, and that the plaintiffs were entitled to notice of the times when the sleepers would be required, and that consequently the plaintiffs are entitled to judgment.

*Judgment for the plaintiffs.*¹

COUNTY COURT APPEAL.

JUSTICE, Appellant, v. GOSLING & others, Respondents.²

February 4, 1852.¹

Trespass — False Imprisonment — Arrest by Police Constable — Charge of Furious Driving — Conviction — County Court Appeal.

The plaintiff sued the defendants, who were police constables, in a county court, for a tort, charging them with having arrested and imprisoned him on a false and unfounded charge

¹ At the trial of the issues in fact, the defendants had a verdict on a plea traversing the "readiness and willingness" of the plaintiffs, alleged in the declaration. A rule nisi was obtained for judgment for the plaintiff, *non obstante veredicto* on that issue. *Raymond* (February 5) showed cause, and the court held that the allegation was immaterial, and made the rule absolute.

² 21 Law J. Rep. (N. S.) C. P. 94. *Coram*, MAULE, J., WILLIAMS, J., and TALFOURD, J.

Justice v. Gosling.

of furious driving. On the trial, the plaintiff stated that the defendants had taken him into custody and detained him in a police station on the charge of furious driving; that the charge was false and unfounded, but that he had been convicted of it by two justices and paid the penalty. The defendants thereupon objected that the plaintiff was put out of court by his own statement, and then proved the conviction. The statute 2 & 3 Vict. c. 47, s. 54, authorizes police constables to take into custody persons committing the offence of furiously driving in a public highway in their view. The case did not show that the plaintiff committed the offence of furious driving in the view of the defendants. The county court judge directed the jury that the conviction was a conclusive answer to the plaintiff's claim:—

The Court of Appeal held, that the direction of the judge below was wrong, and reversed the judgment.

This was an appeal by the plaintiff from the direction of the deputy judge of the County Court of Hertfordshire, at Barnet.

The parties not agreeing, the case was stated by the deputy judge to the following effect: The plaintiff brought his plaint in the above-mentioned county court against the defendants, Gosling, Sumner, and Sunman, for a tort in taking him into custody and detaining him at the police station at Barnet on (as he alleged in his particulars) a false and unfounded charge of furiously driving a horse and gig to the danger of passengers in the public highway. The plaintiff claimed 25*l.* damages. The cause was tried in the county court before a jury on the 29th of August, 1851. On the hearing, the plaintiff stated that the two defendants first named arrested him between ten and eleven o'clock at night on the charge above mentioned; that the charge was false and unfounded; that before they took him into custody he informed them of his name and residence, gave them his card and offered to verify his statement by a person in the neighborhood; that the two defendants notwithstanding took him into custody and delivered him to the third defendant, who, at their request, detained him in the police station at Barnet until he gave bail to answer the charge; that the charge was afterwards heard before the magistrates, who convicted him of the offence charged against him and fined him 20*s.* Thereupon the attorney for the defendants insisted that by this statement the plaintiff had put himself out of court. The judge then asked if the defendants could prove the conviction, on which an examined copy of the following conviction was proved and put in by the defendants: "Metropolitan Police District and County of Middlesex, to wit. Be it remembered, that on the 28th day of April, A. D. 1851, Walter Justice, of Bernard Street, within the said metropolitan police district and county of Middlesex, solicitor, is brought before us, James Dickens, Esq., and Charles Herbert Cottrell, Esq., two of her Majesty's justices of the peace for the said county of Middlesex and county of Hertford, sitting at the Barnet petty sessions court within the metropolitan police district and the said county of Hertford, and is charged before us with having on the 22d of April, A. D. 1851, at the parish of Finchley in the said district or county of Middlesex, in the public thoroughfare there situate, there and then furiously driven a horse and gig along such thoroughfare to the common danger of the passengers in such thoroughfare. And it appearing to us, James Dickens, Esq., and Charles Herbert Cottrell, Esq., upon the oath of William Gosling and John Sumner, credible

Justice v. Goaling.

witnesses, that the said Walter Justice is guilty of the said offence, we do hereby adjudge the said Walter Justice to forfeit and pay for his said offence the penalty of twenty shillings, to be applied as the statute in that case made and provided directs. Given under our hands the day and year first mentioned.

"JAMES DICKENS.

"CHARLES HERBERT COTTRELL."

The plaintiff admitted he had paid the penalty so adjudged against him, and had not appealed from the conviction or taken any other steps to impeach its validity. The case concluded by stating "that thereupon the said deputy judge being of opinion that, under the circumstances hereinbefore mentioned, the said conviction was an answer to the plaintiff's claim for damages, directed the jury to find a verdict for the defendants. The plaintiff being dissatisfied with the said determination and direction in point of law, appeals against the same."

Richmond, for the appellant. The county court judge was wrong in his direction to the jury to find for the defendants. The only evidence adduced against the plaintiff was the conviction for furious driving. This conviction was not admissible in evidence at all. A conviction of a crime is no evidence against a party in a civil action, for it is not a proceeding between the same parties. It was also inadmissible on the ground that possibly the conviction might have proceeded on the evidence of the defendants in the action. 1 Phillipps on Evidence, 520, 8th ed. Possibly the latter objection may not have the same weight now, but the first remains in full force. Secondly, this conviction for furious driving cannot be evidence in a case in which the question is, not whether the plaintiff was driving furiously, but whether he was falsely imprisoned. It is, therefore, irrelevant. Thirdly, assuming the conviction admissible and relevant, and conclusive as to the furious driving, it could not be conclusive evidence on this question, whether the defendants were guilty of false imprisonment. Even if the conviction would exonerate the defendants from liability for arresting the plaintiff, it would not have justified them in beating the plaintiff or keeping him in custody for a week.

[MAULE, J. The plaintiff does not put his case on any such grounds.]

He was prevented from stating his case in full. The statute 2 & 3 Vict. c. 47, which authorizes police constables, as these defendants were, in arresting individuals in certain cases, contains nothing to justify this arrest. Sect. 54 permits constables to arrest parties who *in their view* are guilty of furious driving in a public thoroughfare; but that right is, it is submitted, further limited by sect. 63, which enables a constable to take into custody any person committing offences under the act within view, provided such person does not inform the constable of his name and residence. Here the plaintiff gave his name and residence.

[MAULE, J. Sect. 54 applies to particular offences specified therein. If they are committed within view of the constable he may take the party into custody whether he gives his name or not.]

Justice v. Goaling.

It lay on the defendants to prove that they had good legal cause for imprisoning the plaintiff, and to show affirmatively that the offence was committed within their view. *Simmons v. Millingen*, 2 Com. B. Rep. 524; s. c. 15 Law J. Rep. (N. S.) C. P. 102. Where a justification for a trespass rests upon a statutory provision, it must be strictly followed. *Matthews v. Biddulph*, 3 Man. & G. 390; s. c. 11 Law J. Rep. (N. S.) M. C. 13. It does not appear anywhere in the case that the defendants saw the furious driving.

[MAULE, J. It may be that the constables, knowing from hearsay that the plaintiff had committed the offence, took him into custody and got him properly convicted by the magistrates. But it would not from such conviction follow that the defendants had authority to take the plaintiff into custody. Can it be said that the plaintiff was lawfully arrested?]

Ellis, for the respondents. The objection that it was not proved that the offence was committed within view of the constables is not open on the appeal. It was not taken in the court below, and therefore cannot be urged on appeal, as the courts have already decided.

The plaintiff had not concluded his case. He was interrupted by the defendants' advocate and stopped by the court, who decided against him at once.

[WILLIAMS, J. It is as if the defendants had applied for a nonsuit on the opening of the plaintiff's case. The judge merely asks if the defendants have the formal proof of the conviction.

MAULE, J. In the statement in the case that thereupon the judge was of opinion that "under the circumstances above mentioned the conviction was an answer to the plaintiff's claim," he must be taken to mean under the circumstances mentioned in the plaintiff's opening.]

Ellis. The opening of the plaintiff is analogous to a declaration in case for maliciously arresting the plaintiff and taking him into custody on an unfounded charge. The burden of proof lay on him.

[MAULE, J. This is clearly a declaration in trespass. If you lay hold of a man and take him to a police office it is a trespass, and you must justify it.]

The arrest may be justified under sect. 64 of the above-mentioned statute, which entitles a police constable to take in custody not only persons committing offences within their view, but any one suspected of having committed or being about to commit a breach of the peace. Here the plaintiff had reason to suspect the plaintiff of having committed a breach of the peace.

[MAULE, J. They do not say so, or give any proof of it.]

The case is not clear. It should be sent back to be re-stated.

MAULE, J. No; the judgment below must be reversed with costs.

WILLIAMS, J., and TALFOURD, J., concurred.

Judgment reversed.

 Overton v. Freeman.

OVERTON v. FREEMAN & another.¹

January 13, 1852.

Contractor and Subcontractor — Contractor not liable for Negligence.

A contracted to pave a district, and B entered into a sub-contract with him to pave a particular street. A supplied the stones, and his carts were used to carry them. In the course of the work, B's men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff:—

Held, that A was not liable, and that the fact that the act complained of amounted to a public nuisance made no difference.

Seemle, if the contract of A with B had been to do what might in itself be a nuisance, A would have been liable.

[*Matthews v. The West London Waterworks Company*, 3 Camp. 403; *Bush v. Steinman*, 1 Bos. & Pul. 404; doubted. — *Eds.*]

CASE. The declaration alleged that the defendants negligently and wrongfully caused to be placed divers large stones on a certain public highway, called Grove-street, Commercial Road, and left them there during the night-time without any light near them, by which means the plaintiff fell over them and broke his leg, &c. Plea, not guilty. At the trial before Jervis, C. J., on the 5th December, at the last sittings at Westminster, it appeared in evidence for the plaintiff, that he broke his leg by falling over a heap of paving-stones; that the defendants were contractors, and had entered into a contract to pave the district; that the stones were theirs, and brought to the place in their carts, and left in the street in such a negligent manner as to have caused the accident; but a witness, Timothy Warren, proved that he had contracted with the defendants to pave the street in question; that laborers whom he employed had placed and left the stones where they caused the accident, by his orders, under the direction of the district surveyor; that there was no contract in writing, but a mere verbal agreement to do the work at so much per 100 feet. Upon which the learned judge directed a nonsuit.

Jan. 13. *Stammers* moved for a new trial, on the ground of misdirection. The Chief Justice was wrong in directing a nonsuit. Without denying the liability of Warren, it is submitted that the defendants were also liable. When any person contracts with another for such a work as the present, and a public nuisance is created in the course of the work, and a private injury ensues sufficient to give a cause of action, as here, both parties are liable. Though a nuisance may be public, yet that a special grievance may arise from it, so as to give a private individual a right of action, cannot be disputed. *Rex v. Dewsnap*, 16 East, 195.

[*Maule, J.* That certainly is an elementary proposition.]

In *Bush v. Steinman*, 1 B. & P. 404, A, having a house by the roadside, contracted with B to repair it, and B contracted with C to do

Overton v. Freeman.

the work, and he with D to furnish the materials; and yet it was held, that A was answerable for the negligence of D's servant in placing a quantity of lime in the road near the house, so as to cause the plaintiff's carriage to be overturned. And in that case Eyre, C. J., p. 407, puts this case:—"Suppose that the owner of a house, with a view to rebuild or repair, employs his servants to erect a hoard in the street, (which, being for the benefit of the public, they may lawfully do,) and they carry it out so far as to encroach unreasonably on the highway, it is clear the owner would be guilty of a nuisance; and *I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hoard would be equally his own act.*" In *Reedie v. London and Northwestern Railway Company*, 4 Exch. 244, Rolfe, B., in delivering the judgment of the court, p. 256, shows that the distinction taken in *Bush v. Steinman* between the liability of the owner of fixed and ordinary movable property for a tort, in connection with such property, is not valid, "unless, perhaps, in cases where the act complained of is such as to amount to a nuisance."

[*Williams, J.* In the case of *Knight v. Fox*, 5 Exch. 721; s. c. 1 Eng. Rep. 477, a contractor, under circumstances similar to the present, was held not liable for the acts of a subcontractor's servant.]

Burgess v. Gray, 1 C. B. 578, is to the contrary; and Erle, J., p. 593, says, "The defendant clearly would be liable, unless he had parted with the entire control to Palmer, (the contractor,) and altogether abstained from personal interference himself. *And even if the defendant had parted with the whole control to Palmer, I am at a loss to know why he should not be liable jointly with Palmer.* See also *Norman v. Burnett*, 6 M. & W. 499, and *Rapton v. Cubitt*, 9 M. & W. 710. The authority of Lord Ellenborough is in the plaintiff's favor, who in *Matthews v. The West London Waterworks Company*, 3 Camp. 403, held that the company were liable for the negligence of the workmen employed by persons who contracted with the company to lay down pipes for conducting water through the public streets. (He also cited *M'Laughlin v. Pryor*, 4 Man. & G. 48.)

[*Jervis, C. J.* The simple question is, was the act the act of a servant of the defendant?]

The act amounting to a public nuisance, all the parties contributing to it are equally liable.

[*Jervis, C. J.* The cases you have referred to were cited in *Knight v. Fox*, and the point of the act done amounting to a public nuisance urged.]

MAULE, J. The defendants had contracted to pave a certain district, and Warren, who was called as a witness, contracted with them to pave the street in question; he employed men to lay the stones, which were so left as to cause a public nuisance, and an injury to the plaintiff sufficient to give him a good cause of action; and the only question is, whether the defendants were the proper persons against whom to bring the action. There has been here a public nuisance

committed, and a particular injury resulting, and no doubt they are liable if they had any privity with the persons who actually committed it, viz. the laborers of the subcontractor. It has been urged that the defendants are liable in respect of this being a public nuisance, resulting in private injury, and more so than if the wrong had been private only. But, in truth, the argument is rather the other way, for the liability for a public wrong is less extensive than the civil liability of the same person; the latter may arise where there has been no wrongful act and no negligence, but it is scarcely possible that a public wrong could arise under the same circumstances; and, therefore, the distinction between a criminal and civil wrong is against the liability of the defendants. The case of *Matthews v. The West London Waterworks Company* is the only one which goes to show that a person may be held liable under circumstances such as the present. But that is only a *nisi prius* decision, and is, moreover, very shortly reported; and we have frequently found, on referring to the attorneys whose names are mentioned by the reporter at the end of the cases, that the real circumstances of the case explain the apparent anomaly of the decision. This, as I said, is the only case, except *Bush v. Steinman*, and that appears to have been the result of impressions as to the law since found to be erroneous; and, as my Brother Alderson says in *Knight v. Fox*, the question is, whether the thing was done by a *servant* of the defendants; at least, that is the mode of arriving at the defendants' liability. But this is not so in the case of a subcontractor. Warren may be liable for the acts done, but it does not follow that the defendants' liability ensues on that of Warren. I do not say it would be by any means absurd if the law were otherwise as to subcontractors, so as to make the liability extend from the last up to the first; but it so happens that the law of England is otherwise, and this has grown up gradually, resulting from one case to another; and no one, amongst the various suggestions for the improvement of the law, has recommended any alteration in this respect; and we may assume, therefore, that there results from it no very great practical inconvenience. I think, therefore, that this case, falling as it does within that class of cases in which the subcontractor himself is criminally and civilly liable, there can be no liability in the defendants. I do not mean to say that there can be no case in which both contractor and subcontractor may be held liable; but the mere fact of being contractor does not render a defendant liable without his personally giving directions, or even seeing what had been done without interfering; and, therefore, that there has been no negligence on the part of the defendants; and I think, therefore, there must be no rule.

CRESSWELL, J. I am of the same opinion. The cases of *Rapson v. Cubitt*, *Reedie v. The London and Northwestern Railway Company*, and *Knight v. Fox*, are conclusive on the subject—that the defendants, not personally interfering, and giving no directions, but contracting with a third person to do a legal act, are not responsible for an illegal act done in performance of such contract. It might be otherwise if the act contracted to be done were itself illegal; and this

Overton v. Freeman.

may explain the dictum in *Bush v. Steinman*. The defendant might well have been held liable, if the building of the hoard, the supposed contract, was in itself a public nuisance. In this case the defendants contracted to have the stones laid down as pavement, but do not appear to have contracted to have the stones laid in the manner which caused the injury. The fact of the defendants' carts being used, I think, cannot make any difference.

WILLIAMS, J. I also am of the same opinion. It was admitted on the argument, that this was not the case of master or servant, but contractor and subcontractor; but it was contended that both were liable, because the wrong complained of was a public nuisance. But this is explained away by Parke, B., in *Knight v. Fox*, who says, that the nuisance excepted in Mr. Baron Rolfe's judgment "means a nuisance connected with a man's house or his fixed property."

JERVIS, C. J. *Knight v. Fox* is an express authority against the liability of the defendants. There will, therefore, be no rule.

Rule refused.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE EXCHE-
QUER CHAMBER,
DURING THE YEARS 1851-52.

FENN & others v. BITTLESTON & others, Assignees of a Bankrupt¹

December 5, 1851.

Trover — Mortgage of Goods — Determination of Bailment.

A, by deed, dated the 28th of September, 1845, conveyed certain goods to B absolutely, subject to a proviso that if he should pay to B the sum secured on the 22d of March, 1850, or any earlier day, after receiving from B fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed it was also agreed that, until a default in payment of the principal as before specified or until default in payment of the interest after notice to pay, A, his executors and administrators, should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A, pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 13th of December, 1849, when he became bankrupt, and the defendants, who were his assignees, then took possession of the goods and sold them on the 19th of February, 1850. B had previously assigned the goods to the plaintiffs:—

Held, that although the right to the possession of the goods was vested in A until the 22d of March, 1850, (defeasible by non-payment of the principal and interest according to the provisions of the deed,) yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion for which the plaintiffs were entitled to maintain trover.

TROVER for goods. Pleas, not guilty, and not possessed.

At the trial, before Pollock, C. B., at Guildhall, during the sittings after Hilary term, 1851, it appeared that the plaintiffs claimed to re-

Fenn v. Bittleston.

cover the value of certain goods, which had been assigned to them by one Rhodes, and had subsequently been seized and sold by the assignees of one Malpas, as being in the reputed ownership of the bankrupt at the time of his bankruptcy. The facts proved were, that Malpas and a person of the name of Rhodes married sisters, and were entitled in respect of their respective wives to distributive shares of the effects of their mother, who had died intestate. The bankrupt and his wife had carried on business with those effects, and on an account and division taking place, between Malpas and Rhodes, the former was found indebted in 1,678*l.* and upwards to the latter, and thereupon executed to him a mortgage of the goods and chattels in question in this action upon the 28th of September, 1845. By the mortgage Malpas conveyed to Rhodes absolutely, subject to a proviso that if Malpas should pay Rhodes 1,678*l.* on the 22d of March, 1850, or at such earlier days and times as Rhodes should appoint, by giving fourteen days' notice to Malpas, and should pay interest in the mean time half-yearly, the conveyance should be void; and it was agreed between the parties that until default should be made in the payment of the principal sum of 1,678*l.* at the time before specified, or the interest, after notice requiring payment of the interest, it should be lawful for Malpas, his executors and administrators, to hold and enjoy the chattels. Malpas continued to keep possession of the chattels according to the agreement until the 13th of December, 1849, when he became bankrupt, and his assignees, who were the defendants, on the 19th of February, 1850, sold the whole of them absolutely, not merely the bankrupt's interest. No demand was made by Rhodes or the plaintiffs for the principal money or interest in the mean time from Malpas.

Under his lordship's direction a verdict was found for the plaintiffs for the value of the goods, with leave to the defendants to move to enter a nonsuit. A rule *nisi* having been obtained accordingly,

Hoggins and *Cowling* showed cause, and *Knowles*, *Crompton*, and *Aspland* were heard in support of the rule.¹

The substance of the arguments on both sides is fully stated in the judgment. The following cases and authorities were cited: *Gordon v. Harper*, 7 Term Rep. 9; *Bradley v. Copley*, 1 Com. B. Rep. 685; s. c. 14 Law J. Rep. (N. S.) C. P. 222; *Cooper v. Willomath*, 1 Com. B. Rep. 672; s. c. 14 Law J. Rep. (N. S.) C. P. 219; *Jones v. Dowle*, 9 Mee. & W. 19; s. c. 11 Law J. Rep. (N. S.) Exch. 52; Com. Dig. tit. "Detinue," a, A; *Wheeler v. Montefiore*, 2 Q. B. Rep. 133; s. c. 11 Law J. Rep. (N. S.) Q. B. 34; 13 Edw. 4, 9 b; *Hutton v. Bragg*, 7 Taunt. 14; *Isaac v. Belcher*, 5 Mee. & W. 139; *Hall v. Pickard*, 3 Camp. 187; *Mullett v. Green*, 8 Car. & P. 382; *Wilmshurst v. Bowker*, 5 Bing. N. C. 541; s. c. 8 Law J. Rep. (N. S.) C. P. 309; *Bloxam v. Sanders*, 4 B. & C. 941; *McCarthy v. Abel*, 5 East, 388, 393; *Howes v. Ball*, 7 B. & C. 481; s. c. 6 Law J. Rep. K. B. 106; *Smith*

¹ November 4. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Fenn v. Bittleston.

v. *The Sheriff of Middlesex*, 15 East, 607; *Newberry v. Colvin*, 7 Bing. 190; s. c. 9 Law J. Rep. (N. S.) Exch. 13; *Pain v. Whittaker*, 1 Ry. & M. 99; *Loeschman v. Machin*, 2 Stark. 276; *Manders v. Williams*, 4 Exch. 339; s. c. 18 Law J. Rep. (N. S.) Exch. 437; *Shep. Touch.* by Preston, 272; *Bryant v. Wardell*, 2 Exch. Rep. 479; *Wilkinson v. Hall*, 3 Bing. N. C. 508; 6 Law J. Rep. (N. S.) C. P. 82; *Doe d. Parsley v. Day*, 2 Q. B. Rep. 147; s. c. 12 Law J. Rep. (N. S.) Q. B. 86; *Chapman v. Beecham*, 3 Q. B. Rep. 923; s. c. 12 Law J. Rep. (N. S.) Q. B. 42; *Rogers v. Grazebrook*, 8 Q. B. Rep. 895; *Co. Litt.* 67 a, 71 a; *Youl v. Harbottle*, Peake, N. P. 49; *Wilkinson v. King*, 2 Camp. 335. *Cur. adv. vult.*

Judgment was now delivered by —

PARKER, B. This case was argued before us last term in showing cause against a rule for setting aside a verdict for the plaintiffs and entering a nonsuit, on the ground that the plaintiffs had no right to recover the goods, the subject of this action of trover, against the defendants, the assignees of a bankrupt of the name of Malpas. [His Lordship stated the facts and the material parts of the deed, and proceeded.] It was contended, on behalf of the defendants, that by the covenants in the deed Rhodes gave an interest in the goods in the nature of a demise until the 22d of March, 1850, defeasible by notice, according to the terms of the deed, to pay at an earlier period; consequently that at the time of the conversion by the sale on the 19th of February, 1850, the plaintiffs, the assignees of Rhodes, had no present right of possession, and therefore could not maintain an action of trover on the principles laid down in *Gordon v. Harper* and *Bradley v. Copley*. The plaintiffs, on the other hand, contended that no interest at any time passed by the deed to Malpas, but that the covenant for enjoyment by Malpas either operated as a mere covenant, or, at most, as a bailment to hold at will; and if so, Rhodes might have maintained an action of trover against Malpas. We think the effect of the agreement of the parties in this case was to give not a mere possession and use of the goods to Malpas as bailee, but the right of possession and use for the term ending the 22d of March, 1850, defeasible by non-payment of the principal on fourteen days' notice, and non-payment of the interest in the mean time after notice. The duration of the time of holding was not uncertain, as it would have been had it been only until such notice had been given; in that case it might have been a term for life, which would not be so in the case of a demise of land, for want of livery of seisin. But it has a certain limit which it cannot exceed, namely, the 22d of March. It is therefore good as a grant of a term defeasible, as suggested by Mr. Preston, in his commentary on the passage in *Shepard's Touch.* 272. It is too late to contend that the provision as to possession is a mere covenant after the cases on this subject, concluding with *Bradley v. Copley*. If, therefore, these goods had been simply taken by a third person out of Malpas's custody during the term stipulated for, no action of trover could have been maintained, be-

Fenn v. Bittleston.

cause the plaintiffs would have had no present right to the possession; and the cases of *Gordon v. Harper* and *Bradley v. Copley* would certainly have applied. But the learned counsel for the plaintiffs contended that if the bailment was for that term, it was put an end to by the act of the assignees, whose act for this purpose is the same as that of Malpas himself, in selling the goods themselves absolutely, before the 22d of March, 1850, and so preventing him from returning them at the end of the term, and that such sale is itself a conversion; and we are of that opinion. There is no reported case exactly like the present. In the case of *Bryant v. Wardell*, the chattels were bailed for a time certain, and trover was held to lie by the bailor, because the bailee had done what was equivalent to the destruction of the chattels, and so brought himself within the principle laid down by Lord Coke in Co. Lit. 71 *a*, namely, "That if one lends oxen to another to plough his lands, and he kills them, the owner may have trespass or trespass on the case, at his election." In some cases, the bailment has not been for a time certain as in *Youl v. Harbottle*, where a carrier was held liable in trover for mis-delivery. In *Wilkinson v. King*, *Loeschman v. Machin*, and *Bradley v. Copley*, it rather seems that the bailment was for a time certain in each case, that is, from week to week, but no distinction appears to have been made by the court between such bailment and one at will. But it was held that the act of the bailee in doing an act entirely inconsistent with the terms of the bailment, although not amounting to a destruction of the chattel, was a termination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover. It is true that if this had been done by the bailee *animo furandi*, and the entire chattel had not been severed, but had been disposed of at one time, it would not have been punishable as a larceny, because, being lawfully in possession of the chattel, the taking it could not be either a trespass *vi et armis* or a felony, unless the nature of the article had been changed; as by breaking open a bale, and also, with the same consequences, according to the recent decisions, by disposing of it in different portions. The reason for which distinction is somewhat subtle, but is fully explained in the Year Book, 13 Edw. 4, fol. 9 *b*, namely, the possession of the article in its original state was with the consent of the bailor, and therefore lawful, but there was no consent to the possession of the article in its altered state, so that, after its alteration, the bailment was determined. But, although the delivery of the goods to a third person in their entire state would not have been felony, at all events the delivery under an absolute sale was wrongful, and the contract between those parties never meant to authorize Malpas, his executors and administrators, (and they alone are mentioned, and not his assigns,) to do more than use the goods, and not to give the use to a third person, certainly not for a longer period than his own term. The transfer of the property absolutely to a stranger was therefore unquestionably wrong, and it operated like a disclaimer of tenancy at common law. We are of opinion, therefore, that the plaintiffs are entitled to recover, and the rule must be discharged.

Rule discharged.

Burmester v. Norris.

BURMESTER, Public Officer, v. NORRIS, Official Manager.¹

June 30, 1851.

Mining Company — Power of Directors to Borrow Money.

The directors of a mining company have no implied authority to borrow money on the credit of the company, for the purposes of carrying on the mines, or for any other purpose, however useful or necessary to the objects for which the company is formed.

By the deed of settlement under which a company was carried on, a capital of 50,000*l.* was provided, and there were powers to create new shares, and to alter the provisions of the deed by the vote of a special general meeting. There was also a clause "that the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall be not less than five or more than nine, and three of them shall, at all meetings of directors, and for all purposes, be competent to act":—

Held, that under this deed the directors had no express authority to borrow money for the necessary purposes of the mines.

ASSUMPSIT by the plaintiff, as public officer of the London and Westminster Bank, against the defendant, appointed, under the 11 & 12 Vict. c. 45, the official manager of the German Mining Company, for money lent, &c.

Plea — the general issue.

At the trial, before Platt, B., at the sittings after Michaelmas term in London, it appeared that the German Mining Company had been established, by a deed of settlement, in the year 1836, for the purpose of purchasing and working certain mines in Prussia and Bavaria. The material provisions of the deed were, that the capital of the company was to be 50,000*l.* in 100 shares of 500*l.* each, which was to be paid up in certain instalments, and the general management of the company was provided for by the following clause:—"That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five nor more than nine; that three of them shall, at all meetings of directors, and for all purposes, be competent to act; and that the directors shall appoint and remove all officers and servants of the company, and award to them such salaries, wages, and other compensation as they shall think fit, and any director or directors shall be removable by a majority of votes at a general meeting of the shareholders, specially convened for the purpose, and all boards of directors shall be held in London and not elsewhere, unless under the authority of a board in London." No express power to borrow money was given to the directors, but there was the following general clause:—"That in case it shall appear to the directors to be desirable to sell and dispose of any of the mines and property of the company, or to subdivide the shares therein, or to create new shares, or to subdivide the present shares, or to make any alteration in the constitution of the company, or to propose any new rules, powers, or conditions for carrying on the same, or to rescind, alter, or make any additions to

¹ 21 Law J. Rep. (N. S.) Exch. 43.

Burmester v. Norris.

the clauses, powers, and provisions herein contained, or any other matter or thing which may not be or appear to be within the scope, intent, and meaning of these presents, it shall be lawful for the directors to call a special general meeting or meetings of the shareholders, for the purpose of taking such matter or subject into consideration, and adopting or rejecting the same, and that such matter shall be disposed of, adopted, or rejected at such special meeting or by the result of a ballot taken in pursuance thereof, as if the same had been a matter or subject thereby expressly made cognizable and determinable by a special meeting or ballot." The company was not successful, and the funds originally subscribed were expended, and some new shares were also created pursuant to the terms of the deed. The receipts from these sources and from the proceeds of the mines, were, however, still inadequate to meet the expenses, and the directors had, from time to time between 1842 and 1848, borrowed large sums from the London and Westminster Bank, for the *bonâ fide* purpose of carrying on the mines. For several years the moneys so borrowed were entered in the books of the company, and appeared in the annual reports presented at the general meetings, held pursuant to the deed, and which reports were regularly sent to the shareholders. An order for winding up the company was obtained in 1848, and the defendant was appointed official manager, and this action had been brought, by order of Knight Bruce, V. C., to recover the balance due to the London and Westminster Bank upon these loans.

His lordship left it to the jury to say whether there was a necessity for the purpose of carrying on the mines that the money should be borrowed, and whether the directors had acted for the company in what they did, not intending to pledge their own credit. The jury found a verdict for the plaintiff for 8,400*l*.

In Hilary term a rule *nisi* had been obtained for a new trial, for misdirection, against which—

Sir F. Thesiger and *Bovill* now¹ showed cause. The question put to the jury was a proper one under the circumstances, and their answer is a guide to the construction to be put upon the deed, which, it is submitted, must by the general authority delegated to the directors, enable them to borrow money for the necessary purposes of the mine, that they may, as agents for the shareholders, carry on the partnership business. There was the fullest evidence given that the loan was essential to the existence of the company, and the shareholders, who were only thirty-six in number, were informed of all that was done, and might have attended at the general meetings to object, if they had thought proper. If, therefore, it is necessary to support the transaction by their acquiescence, there was abundant evidence of it. The case of *The Bank of Australasia v. The Bank of Australia*, 12 Jur. 189, which was cited at the trial, is a strong authority in favor of the plaintiff. It was there held, upon appeal to the Privy Coun-

¹ May 28, before POLLOCK, C. B., ALDERSON, B., MARTIN, B., and PLATT, B.

Burmester v. Norris.

cil, that the directors of a banking company, without any specific powers of borrowing money, had under their general powers authority to borrow money to pay off the existing liabilities of the bank. In that instance, the deed contained the same provisions as this with respect to raising funds by new shares, and this case is still stronger, for the money was advanced by the plaintiffs and used by the directors of the German Mining Company, for the purpose of carrying on the mine. The deed itself gives them the fullest power; for the affairs "are to be under their sole and entire control." If it be usual or necessary in the management of mines to borrow money, the directors have an implied authority to bind the shareholders in the absence of any proof of a more limited authority. *Tredwen v. Bourne*, 6 Mee. & W. 461; s. c. 9 Law J. Rep. (N. S.) Exch. 299, and *Hawken v. Bourne*, 8 Ibid. 703; s. c. 10 Law J. Rep. (N. S.) Exch. 361. In *Dickenson v. Valpy*, 10 B. & C. 128; s. c. 8 Law J. Rep. K. B. 51, the question was whether directors had authority to draw bills, but that was not a usual method of carrying on mining concerns, and therefore the shareholders were not bound. Here there is no limitation, by the deed, of their authority. *Ricketts v. Bennett*, 4 Com. B. Rep. 686; s. c. 17 Law J. Rep. (N. S.) C. P. 17, is distinguishable, because the mine there in question was upon the cost-book principle, and so the implied authority to borrow money was negatived, such mines not being carried on upon credit. *Steigenberger v. Carr*, 3 Man. & G. 191; s. c. 10 Law J. Rep. (N. S.) C. P. 253, shows that acquiescence in the business being carried on in a different way from that prescribed by the deed, may be implied from the attendance of the shareholders at the meetings of the company and the opportunity of obtaining full information.

The Attorney-General, (Sir A. Cockburn,) with whom were *Crowder*, *Cowling*, *C. Smith*, and *Drewry*, in support of the rule. The sole question in these cases is, whether the deed which defines the legal position of the parties clothes the directors with the powers they assumed to exert. It is a joint-stock company for a given purpose, and that purpose cannot be departed from, nor yet carried out by any other than the prescribed means.

[ALDERSON, B. If they needed money to carry on the concern, they should have called a meeting for the purpose, as the deed directs.]

Hawtayne v. Bourne, 7 Mee. & W. 595; s. c. 10 Law J. Rep. (N. S.) Exch. 224, is a distinct decision, that the managers of a mining concern have no authority to pledge the credit of the shareholders by borrowing money for any purpose, however necessary for the benefit, or even preservation, of the mine. There the money was borrowed to pay the arrears of wages due to the laborers, who had obtained warrants of distress upon the materials of the mine, and this court held that the shareholders were not liable. In *Ricketts v. Bennett* the shareholders were held not to be liable, although the money was borrowed to prevent the mine from being drowned. The case of *The Bank of Australasia v. The Bank of Australia* rests upon the peculiar

Burmester v. Norris.

nature of a banking business, to which borrowing money for the purposes of the partnership is a necessary incident. No question was left to the jury as to the acquiescence or sanction of the shareholders, and nothing but the consent of every party interested would be of any avail on this point. *In re Vale of Neath Brewery, ex parte Morgan*, 1 Mac. & Gor. 225; s. c. 18 Law J. Rep. (N. S.) Chanc. 265; *Fisher v. Tayler*, 2 Hare, 218; *Ridley v. Plymouth, &c., Baking Company*, 2 Exch. Rep. 711; s. c. 17 Law J. Rep. (N. S.) Exch. 252.

[MARTIN, B. referred to *Bosanquet v. Shortridge*, 20 Law J. Rep. (N. S.) Exch. 57.]

Cur. adv. vult.

Judgment was now delivered by

ALDERSON, B. This was a motion for a new trial, and was argued before us. The cause was tried before my brother Platt, and the question arose as to whether or not the committee of directors by whom certain German mines were to be carried on, had the power of borrowing; and it appeared from the circumstances of the case, and the jury found, that in their opinion it was necessary for the purpose of carrying on the mines that the money should be borrowed; but we are of opinion that, notwithstanding that finding, the company could not have any such power as that of borrowing money. The mines were to be worked by a company, and the company was to levy a large sum of money with which to carry on that concern, amounting to about 50,000*l*. There is, in the deed of settlement, by which the directors were empowered to act, a power in very general terms: it is, "that the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five or more than nine, and three of them shall form meetings of the directors, and shall for all purposes be competent to act." Now, no doubt those are very large words, but they must be taken in conjunction with the general words and purport of the deed; and the general words and purport of the deed confine the concern to the carrying on of the mines by levying a large sum of money as capital, out of which capital the mines are to be worked for the benefit of the company. It follows, therefore, that the directors had the whole, sole, and complete, exclusive and entire control, only with respect to the management of the company by means of the moneys which were levied, and that they had no power whatever to borrow money. It would make a vast difference to the subscribers if such a power contained in these words were to be construed as imposing an unlimited responsibility on the parties who have entered into the concern, beyond the capital which they supposed themselves to have subscribed, and with which capital the concern was entirely to be carried on. We think, therefore, my brother Platt was wrong in leaving the point to the jury; and that though the jury might in their opinion think it necessary for the purpose of carrying on the mine, and convenient, that the money should be borrowed, yet that could not be done without the consent of all the subscribers; and with the consent of all

 Isaacs v. Wyld.

the subscribers, no doubt, it might be done. That would be on a totally different footing. We think, therefore, there must be a new trial.

Rule absolute.

 ISAACS v. WYLD.¹

December 5, 1851.

County Court—Claim above 50l.—Abandonment of Excess; when to be made.

Where a plaint is brought in a county court to recover 50l. in respect of a cause of action to a greater amount, the excess being abandoned, pursuant to 9 & 10 Vict. c. 95. s. 63, the abandonment need not appear upon the plaint or particulars of demand, although such is the most reasonable course.

Where, therefore, at the hearing the excess was abandoned, and a minute made by the judge of the abandonment, it was:—

Held, on motion for a prohibition, that he had jurisdiction to give judgment and grant execution for 50l.

THIS was a rule *nisi* for a prohibition to the judge of the County Court of Cornwall to restrain him from proceeding in this cause.

It appeared upon the affidavits, that the plaint, summons, and particulars were in the ordinary form as for a debt of 50l. for goods sold, but at the trial it was shown that the plaintiff's entire claim was upwards of 98l. for goods supplied to the defendant at various times, but so as to form one entire demand. The judge then required the plaintiff to abandon the excess above 50l., which the defendant objected to, but the abandonment was then made, and a memorandum written on the particulars that the 50l. sought to be recovered was in full satisfaction of the whole sum claimed. Judgment was then given for the 50l., the abandonment of the excess being entered by the judge upon his minutes. The rule had been obtained upon the ground that the court had no jurisdiction, the abandonment not having been made in time.

Kingdon now showed cause².—The question turns upon the construction to be put upon the 9 & 10 Vict. c. 95, s. 63, which enacts, "It shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts; but any plaintiff having cause of action for more than 20l., for which a plaint might be entered under this act if not for more than 20l., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20l.; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judg-

¹ 21 Law J. Rep. (N. S.) Exch. 46. 15 Jur. 1135.

² Nov. 22, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Isaacs v. Wyld.

ment shall be made accordingly." By the 13 & 14 Vict. c. 61, s. 1, the jurisdiction is extended to 50*l.*, and the same provisions as to abandonment, &c., are made applicable to proceedings for the larger sum. There are two answers to this rule; first, that it is a mere question of practice when and how the abandonment is to be made, and therefore it is not a subject for prohibition. *Ex parte Smyth*, 2 Cr. M. & R. 748; s. c. 5 Law J. Rep. (N. S.) Exch. 33; *Roberts v. Humby*, 3 Mee. & W. 120; s. c. nom. R. v. Bath Court of Requests, 7 Law J. Rep. (N. S.) Exch. 45; *Jolly v. Baines*, 12 Ad. & E. 201; s. c. 9 Law J. Rep. (N. S.) Q. B. 349. In *Mellish v. Richardson*, 1 Cl. & F. 224, Bayley, B., in delivering the opinion of the judges said, "The practice of the courts below is a matter which belongs by law to the exclusive discretion of the court itself, it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to or revision by a superior court." And under the County Courts Act a prohibition was refused although it was shown that the defendant never had in fact been summoned; the court holding, that the sufficiency of the service of the summons was a matter of practice for the Judge of the county court exclusively. *Robinson v. Lenaghan*, 2 Exch. Rep. 333; s. c. 17 Law J. Rep. (N. S.) Exch. 174.

[PARKE, B. It is contended here that there is no jurisdiction unless the excess is first abandoned.]

It is a mere matter of practice, and the judges would have power under the 12 & 13 Vict. c. 101. s. 12. to regulate it by a rule of court. But the further answer is, that the abandonment was rightly made at the hearing of the plaint. The actual abandonment is all that is required by the statute, and in the absence of a statutory provision or any rule of court made pursuant to the statute, an abandonment as in the present case suffices. The point has been discussed incidentally several times, but not yet decided. In *Vines v. Arnold*, 8 Com. B. Rep. 632; s. c. 19 Law J. Rep. (N. S.) C. P. 98, where a plaint had been brought and judgment obtained upon the admission of the defendant for 17*l.*, the real amount being 38*l.* 10*s.*, and there was no abandonment of the excess, it was held, that the plaintiff could recover the balance in another action. Maule, J., there said, "If the plaintiff had appeared, the defendant might have said he was entitled to judgment unless the plaintiff abandoned the residue of his claim, and the plaintiff might then either have abandoned it or withdrawn." This implies that the abandonment at the hearing, was sufficient.

[PARKE, B. The decision in that case only was that some act of abandonment was necessary.]

In *Brunskill v. Powell*, 19 Law J. Rep. (N. S.) Exch. 362, Parke, B. delivering the judgment of the Court said, "It does not appear that the plaintiff entered any disclaimer or any minute or memorandum upon the records of the county court disclaiming the remainder at the time that he recovered the sum of 20*l.*"

[PARKE, B. What I there said was, that there must be some minute on the record; I did not consider when it was to be entered.]

The point was again referred to in *The Apothecaries Company v.*

Burt, 5 Exch. Rep. 363, s. c. 19 Law J. Rep. (N.S.) Exch. 334; but nothing was decided. Under the old practice in the county court the admission of the receipt of part of a demand, in order to bring it within the jurisdiction, was made in the declaration—*Com. Dig.* tit. 'County Court,' 8.

Udall, in support of the rule.—It is submitted that the true construction of the statute is, that the abandonment is a condition precedent to the jurisdiction where the cause of action exceeds 50*l*. Why should the defendant be compelled to go into court to ascertain that the plaintiff will be satisfied with the less sum when he would probably pay at once or not appear if he was informed by the plaintiff that the excess was abandoned? The cause of action in the 63rd section must mean the cause of action in the plaint, and therefore the whole cause of action must there be stated. This is in conformity with other sections, as the 59th, which requires the substance of the action intended to be brought to be specified in the plaint and the summons, and by section 75, no evidence of any demand or cause of action not stated in the summons is to be given. There ought, at any rate, to be some formal act before the day for hearing. Here the defendant did all that he could to insist upon his right at the time by objecting to the abandonment at that stage of the cause.

Cur. adv. vult.

Judgment was now delivered by—

PARKE, B. This was a rule for a prohibition against the Judge of the County Court of Cornwall to prohibit him from proceeding in a plaint for 50*l*. for goods delivered. It appeared on the affidavits that this was part of a larger sum of 98*l*. for goods supplied at different times, which would constitute an entire demand, on the principle laid down in *Grimbly v. Aykroyd*, 1 Exch. Rep. 479; s. c. 17 Law J. Rep. (N.S.) Exch. 157; and it was contended the Judge had no jurisdiction to try a plaint for part of a demand, which this was, unless a disclaimer was entered on the proceedings of the court at the time of the plaint entered. The question turns upon the 63rd section of the 9 & 10 Vict. c. 95.—[His Lordship read the section and proceeded.] On the construction of this clause it has been held in several cases—*Vines v. Arnold* and *Brunskill v. Powell*—that the mere fact of suing for a portion of an entire demand is not an abandonment of the excess, but that some act of abandonment in the court is necessary, and it seems that a memorandum of such abandonment ought to be entered on the proceedings of the court; but it does not clearly appear from the wording of this section, nor has it been decided, when such abandonment must take place. The plaintiff may abandon, and thereupon, on proving his case, recover the amount to the extent to which the county court has jurisdiction. The most reasonable course undoubtedly is that the abandonment should be on the face of the summons or the particulars annexed, so that the defendant may at once accede to the claim if he is so minded, instead of being obliged to be at the

Lawrance v. Boston.

trouble and expense of attending the county court in order to compel the plaintiff to abandon the excess above 50*l.* on the hearing; but there is no express provision to this effect in the act: and the language of the 63rd section, although equivocal, seems rather to intimate that the abandonment may be on or before the hearing. In this case there was at the time of the hearing a formal abandonment of the excess of the entire demand above 50*l.*, and an entry or minute made on the face of the proceedings, and after such abandonment we cannot say the judge of the county court had not jurisdiction to give judgment and to grant execution for 50*l.* We therefore think the rule should be discharged. It certainly would be as well if the county court judges should, under the powers of 12 & 13 Vict. c. 101, s. 12, make a rule to require the disclaimer to be stated on the face of the summons or particulars of demand annexed.

Rule discharged, without costs.

LAWRANCE v. BOSTON & others.¹

November 22, 1851.

Mortgage—Stamp Act, 55 Geo. 3, c. 184, Sched. Part 1, "Mortgage"—Policy of Insurance.

A being indebted to the defendant in 184*l.* 7*s.* 6*d.* mortgaged by deed certain furniture to him, and also assigned a policy of assurance, with a proviso for redemption on payment of the principal money and interest. It was also provided, that on default of payment, the defendant should have the power of taking and selling the furniture, and of reimbursing himself thereout for all costs and expenses, and also for all sums expended by him in keeping the policy on foot. Then followed a covenant by A for repayment to the defendant of 184*l.* 7*s.* 6*d.*, and for payment to the insurance office of the premiums: that in case of avoidance of the policy, or the insolvency of the insurance company, A would insure in another office, and assign the new policy to the defendant: that in case of A's neglecting to pay the premium, the defendant might pay it to the office, and that the sums advanced by the defendant for continuing the insurance should be considered as principal moneys and bear interest, and that the policy should be a security to the defendant for the repayment thereof, and should not be redeemed without payment to the defendant of the sum advanced and interest, as well as of the 184*l.* 7*s.* 6*d.*:—

Held, that such mortgage was not a "security for the repayment of money to be thereafter lent, advanced, or paid" to an amount "uncertain and without limit," within the Stamp Act, 55 Geo. 3, c. 184, sched. Part 1, tit. "Mortgage," and therefore that it did not require a stamp of 2*6l.*

TRESPASS for breaking and entering the plaintiff's house, and seizing his goods.

Pleas. First, not guilty; secondly, that the house was not the plaintiff's house; thirdly, that the goods were not the goods of the plaintiff.

At the trial, before Cresswell, J., at the last Suffolk Summer Assizes, the facts were these:—A person named Guy being indebted to the defendant Boston in the sum of 184*l.* 7*s.* 6*d.*, assigned to the latter by way of mortgage certain furniture and goods. The deed of

¹ 21 Law J. Rep. (N. S.) Exch. 49.

assignment recited a policy made by Guy with the Mitre Assurance Office, and a debt of 184*l.* 7*s.* 6*d.* as due from Guy to the defendant Boston. It was then witnessed that Guy sold and assigned to the defendant the said furniture, and also assigned to him the policy of assurance, subject to a proviso for redemption on payment of the principal money and interest by instalments; and that on default of payment the defendant might enter the house of Guy and take possession of the furniture, and sell the same, and out of the moneys received should have the power of reimbursing himself for all costs and expenses, &c., and also for sums that he might expend in keeping on foot the policy. There was then a covenant by Guy for repayment to the defendant Boston of 184*l.* 7*s.* 6*d.*, and for payment to the Mitre Assurance Office of the annual premiums: and that in case of the policy being avoided, or in case of the insolvency of the assurance company, Guy would cause an insurance to be effected in some other office, and would assign such last-mentioned policy to the defendant. That in case of Guy's neglecting to pay the premium, the defendant might pay it to the assurance office, and that the sums advanced by the defendant for continuing the insurance should be considered as "principal moneys," and bear interest. That the policy should be security to the defendant for the repayment thereof; and that the policy should not be redeemed without payment to the defendant of the sums advanced and interest, as well as of the 184*l.* 7*s.* 6*d.* The instalments not having been paid, and the defendants having seized the furniture in question under the deed of assignment, the plaintiff claimed it as his property and brought the present action. The defendants tendered in evidence the deed of assignment, bearing a 2*l.* stamp: this was objected to on the part of the plaintiff, on the ground of its not being stamped with a 25*l.* stamp, under the 55 Geo. 3, c. 184, sched. Part 1, tit. "Mortgage."¹ The learned judge overruled the objection and received the deed, and the defendants had a verdict.

Prendergast having obtained a rule *nisi* for a new trial, on the ground of the improper reception of this evidence, —

November 21 and 22. *Byles*, *Serjt.*, and *Couch*, for the defendant Boston; *O'Malley* and *D. Keane*, for another defendant; and *Power*, for the two other defendants, showed cause. The deed was properly stamped with an *ad valorem* stamp, and did not require a stamp of 25*l.* within the Stamp Act, 55 Geo. 3, c. 184, sched. Part 1, tit. "Mortgage." The sum to be secured in this case is 184*l.* 7*s.* 6*d.* only, and

¹ The clause applicable to this case is as follows: — "And when the same respectively shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage or security against damage by fire, or to be advanced for the insurance of any life or lives pursuant to any agreement in any deed whereby any annuity shall be granted or secured for such life or lives; if the total amount secured or to be ultimately recoverable thereupon shall be uncertain and without any limit, 25*l.*

the other sums charged are merely for the purpose of enabling the principal sum to be realized.

[PARKE, B. Your argument is, that there was no "debt" in this case beyond the amount of 184*l.* 7*s.* 6*d.* *Wroughton v. Turtle*, 11 Mee. & W. 561; s. c. 13 Law J. Rep. (N. S.) Exch. 57, shows that, to render a stamp necessary, there must be a "debt."]

That is the argument.

[PARKE, B. It may be doubtful whether the case of *Halse v. Peters*, 2 B. & Ad. 807; s. c. 1 Law J. Rep. (N. S.) K. B. 2, is good law.]

The premiums of insurance were not a charge by way of mortgage, but were merely the means of enabling the mortgagee to recover the principal sum secured.

[PARKE, B. I do not think there is a "debt" in this case within the meaning of the Stamp Act.]

Doe d. Merceron v. Bragg, 8 Ad. & E. 620; s. c. 7 Law J. Rep. (N. S.) Q. B. 263; and *Doe d. Scruton v. Snaith*, 8 Bing. 146, are in point. This case is governed by *Wroughton v. Turtle*. There Parke, B., in delivering the judgment of the court, uses the following language with reference to the clauses in question in the Stamp Act:—"These two classes appear to embrace mortgages for all descriptions of *debts*—the first, present; the second, future. The first class, in express terms, embraces present loans and debts only. The second ought to be construed in the same way to apply to future loans and debts only; for there is no reason why a mortgage for the same description of payment should be subject to duty in one case and not in another; why it should be subject to duty if made after the execution of the instrument, and not if made before. By holding that the word "paid" means so paid as to constitute a debt, and the repayment of which the mortgage is to secure, the whole enactment is rendered reasonable and consistent." The maxim, *expressio eorum quæ tacite insunt nihil operatur* applies to this case. Here the covenant is not, to pay the premiums to Boston, but to the insurance office. The debtor would be charged by law with the premiums and interest, and therefore the deed does no more than the law would do without it. *Doe d. Scruton v. Snaith*. *Frith v. Rotherham*, 15 Mee. & W. 39; s. c. 15 Law J. Rep. (N. S.) Exch. 133, was the case of a bond conditioned for the payment to bankers of all such sums of money not exceeding in the whole 1000*l.*, which from time to time should be and remain due from the obligor to the bankers on the balance of his account current, together with such interest and commission as should be due to the said bankers, and all customary and incidental charges for stamps, &c.; and it was held that a stamp on the principal sum of 1000*l.* was sufficient. The premiums are made merely for the purpose of preserving the principal subject-matter that is to be secured. They are merely subsidiary. Again, advertent to the language of the deed, the covenant is to the effect, that the sums paid shall be considered as "principal *moneys*," not as *the* principal money. The question is, what was the sum secured by this deed? And it is plain that that sum was 184*l.* 7*s.* 6*d.*, and no more.

Lawrance v. Boston.

Prendergast and *Cowling*, in support of the rule.—This case falls within the principle of *Wroughton v. Turtle*. The debtor (Guy) stipulates that on the happening of certain events he shall be bound to make a fresh insurance, a step which but for this express stipulation he could not be bound to take. The payments attach to the insurance, but a new estate is mortgaged to the insurance company. If a fresh policy were effected, different premiums and different sums of money would have to be paid annually.

[PARKE, B. This is the case of a charge on the policy, and not on the furniture.]

It is submitted that the charge is upon the furniture; for the sums that may be advanced by the defendant for continuing the insurance are to be considered as principal moneys, and are to bear interest. The payments are put on the footing of principal money, and all the powers for securing the one are applicable to the other.

[PARKE, B. The subject-matter must be a "debt" before it can be liable to stamp duty.]

It is a debt. The parties stipulate that it shall not only be a debt, but that it shall be a charge upon the property, and an action of covenant might be maintained in respect of it. The words of the Stamp Act are, "advanced and paid;" and the words in the mortgage deed are, "sums to be advanced." Here, there was a charge creating an additional debt, and that required a larger stamp. It is not necessary to question the authority of *Doe d. Scruton v. Snaithe*. There the costs are impliedly to be paid by the mortgagor; and, therefore, the rule *expressio eorum quæ tacite insunt nihil operatur* applied. *Halse v. Peters* and *Wroughton v. Turtle* govern this case.—They also referred to *Doe d. Mercer v. Bragg* and *Frith v. Rotherham*.

Own. adv. vult.

The judgment of the Court¹ was now delivered by—

POLLOCK, C. B. In this case we think the rule must be discharged. The question was as to the sufficiency of the stamp on a mortgage deed, and it was insisted, that inasmuch as it was framed so as to give security for an advance of an indefinite amount of debt, it required a stamp of 25*l.*, whereas the one stamp imposed upon the deed was that appropriated to a sum under 200*l.* only. The case of *Wroughton v. Turtle* seems to us to decide the question when properly considered. There it was held by this Court, that the securities thereafter to be made are constituted, when made, a debt recoverable by law between the parties, and require, in case those debts are not limited in amount, a stamp of 25*l.*; but where those debts are only charges on the mortgage, but not debts recoverable at law, the amount of the stamp is limited by the amount of the original debt secured.

There is also a second principle adverted to in the judgment, namely, that if the charges expressly laid on the property by the deed are such as without express words fall on the mortgage, the same

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

 COTTEE v. Richardson.

consequence follows, that they are not to be added in estimating the amount of the stamp requisite to the original debt secured. Now, we think, that the first of these principles is sufficient to decide the present case.

The sum secured here is 184*l.* 7*s.* 6*d.*; it is secured by a mortgage upon the furniture, and upon a policy of insurance for 499*l.* 19*s.* 6*d.* The insurance was in the Mitre Insurance Office. There is a stipulation, that if the mortgagor does not duly pay the premiums, the mortgagee may do so and add them as a charge to the first property mortgaged. If this charge had been confined to the policy, the principle *expressio eorum quæ tacite insunt nihil operatur* would have applied; but it is not so confined as to this property. But though this is so, we do not think that on the proper construction of the whole deed this charge when paid by the mortgagee became a *debt* due from the mortgagor to him, and recoverable at law. The covenant to pay is confined to the original debt, the 184*l.* 7*s.* 6*d.* As to the expense of obtaining a fresh policy, and the payment of these premiums by the mortgagee, we think that the deed, properly considered, charged them only on the new policy, and does no more than, without such an express charge, a court of equity would have compelled the mortgagor to do. Now, the words that those charges should be "principal moneys," and that interest should be charged on the second policy, and should be deducted out of its eventual proceeds, do not, as we think, amount to any covenant by the mortgagor to pay them to the mortgagee. In this part of the deed, therefore, both the principles stated in *Wroughton v. Turtle* apply. Looking, therefore, at both parts of the mortgage, we think that the only debt secured by the deed was that of 184*l.* 7*s.* 6*d.*; and, therefore, that the stamp was sufficient. The rule, therefore, will be discharged.

Rule discharged.

COTTEE v. RICHARDSON.¹

December 5, 1851.

Lease — Merger — Assignment operating as New Lease.

A, the plaintiff, demised to B certain premises for a term of fifty-five years, in consideration of 500*l.*, subject to the payment of a yearly rent of 84*l.*, and covenants for repair, &c., but the consideration money not being paid, B, &c. subsequently assigned to A, by way of mortgage, the whole of the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. Notice of sale having been given by A. pursuant to the power, the plaintiff, in consideration of 500*l.* by a deed "bargained, sold, assigned, transferred, and set over" to the defendant the premises described in the lease, to hold for all the rest, residue, and remainder of the said term of fifty-five years granted by the plaintiff to B discharged from the mortgage debt, but subject to the payment of the

¹ 21 Law J. Rep. (N. S.) Exch. 52.

Cottee v. Richardson.

yearly rent of 84*l*., and to the covenants in the said lease to B; and the defendant covenanted to pay the rent and perform the covenants. The defendant then entered upon the premises:—

Held, that although the term of fifty-five years was merged by the mortgage to the lessor, the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant was liable upon the covenants to pay the rent, and to perform the repairs.

COVENANT. The declaration stated that by an indenture, dated the 23rd of September, 1830, and referred to in the recitals of the indenture next hereinafter mentioned, then made between the plaintiff as sole executor of William Cottee of the one part, and Daniel Allen of the other part, the plaintiff, in consideration of the sum of 530*l*. to be paid by the said Daniel Allen to the said plaintiff, did demise and lease unto the said Daniel Allen, his executors, administrators, and assigns, all that messuage or tenement therein described as partly leased to Francis Taylor, and in the occupation of certain persons, together with the right of way and free egress and ingress to the said premises, to have and to hold the said messuage and premises, with the appurtenances, subject to the said lease to Francis Taylor of part thereof, unto the said Daniel Allen, his executors, administrators, and assigns, from the 25th of September then instant, for the term of fifty-five years; who then covenanted to pay to the plaintiff as such executor as aforesaid, his executors, administrators, and assigns, a rent of 84*l*. per annum, and also to repair. It then stated that afterwards, on the 7th of July, in the year 1832, by another indenture made between the plaintiff of the one part, and the defendant of the other part, reciting the lease of the 23rd of September, 1830, and that the plaintiff had agreed to take with other security a mortgage of the said leasehold premises for the sum payable as thereinafter mentioned, it was witnessed that Daniel Allen did bargain, sell, assign, transfer, and set over unto the plaintiff, his executors, administrators, and assigns, the premises comprised in and demised by the thereinbefore in part recited indenture of lease of the 23rd of September, 1830, with their appurtenances, and the right, title, and interest of the said Daniel Allen thereto, to hold the same unto him, his executors, administrators, and assigns, for all the residue then unexpired of the term of fifty-five years created by the said thereinbefore recited indenture of lease, subject to the rents and covenants in the same indenture reserved and contained; and also subject to a proviso and agreement for redemption by the said Daniel Allen, his heirs, executors, and administrators, on payment by him or them of 530*l*., with interest, at the rate of 5*l*. per cent. per annum, at a day thereinbefore mentioned and then long since past, and with power to sell on giving three months' notice. It then stated that, pursuant to that power, notice had been given to sell, that Daniel Allen had become insolvent, and that the plaintiff had agreed to sell to the defendant for 500*l*. It then stated, that in consideration of the 500*l*. in hand paid to the plaintiff, the plaintiff bargained, sold, assigned, and transferred and set over to the defendant all those the tenements described in the lease, to have and to hold the premises from the 23rd

Cottes v. Richardson.

of June then next, for and during all the rest, residue, and remainder of the term of fifty-five years granted by the hereinbefore recited indenture of lease of the 23rd of September, 1830, and from and absolutely discharged from the mortgage debt of 530*l.* and interest, and every part thereof, and of and from all rights or equity of redemption of the said Daniel Allen, his executors, administrators, or assigns, subject, nevertheless, to the thereinbefore mentioned lease to Thomas Taylor, and the payment of the yearly rent of 84*l.* reserved and made payable in and by the said recited indenture of the 23rd of September, 1830, and to the performance of the covenants. It then stated that the defendant covenanted at all times during the continuance of the said term of fifty-five years thereby assigned, or intended so to be, well and truly to pay, or cause to be paid, the said yearly rent of 84*l.* by the said recited indenture reserved and made payable, and to be performed and fulfilled, and keep all the covenants, provisos and agreements in the said indenture contained, on the tenants', lessees', or assignees' part to be observed and performed. It then stated that the defendant entered upon the premises thereby assigned, and alleged as breaches (*inter alia*) the non-payment of three quarters' rent, and the non-repair of the premises, to the plaintiff's damage, &c.

Plea. That before the breach of the covenants the defendant had assigned all his term, right, or interest in the premises (if any) to one Edward Lawson, provided that the said assignment should not be treated as implying that the said term was existing, or that the defendant had any interest therein.

Special demurrer and joinder.

*Phipson*¹, in support of the demurrer. The plea is clearly bad, if the assignment to the defendant was operative. But it will be objected that the effect of the deeds stated in the declaration is, that the term granted by the plaintiff to Allen was merged by the mortgage of the 7th of July, 1832, and that the conveyance to the defendant therefore was inoperative. A merger, however, only takes place when the estates are held in the same legal right. (Upon this point, he referred to *Wisco's case*, 2 Rep. 61 *b.*, and the note thereto in the edition by *Fraser*; *Bro. Abr.* tit. "Surrender," pl. 52; *Vin. Abr.* "Surrender," G, 1; *Preston's Conveyancing*, vol. 3, p. 273.) Here, the plaintiff had the term as executor.

[PARKE, B. He could not have it as executor.]

But assuming that there was a merger of the term, the defendant is nevertheless liable, because there is a re-creation of the lease, as between the plaintiff and the defendant. It is an indenture, and purports to be from the plaintiff and to the defendant, and there is a reservation of rent, so that the defendant is lessee by direct demise. The intent of the parties was, that the one should divest himself of the possession, and the other come into it for a determinate time, and the intention will be upheld by the Court if possible. *Bac. Abr.* "Lease," *k.* Thus, in *Wilkinson v. Hall*, 3 Bing. N. C. 508; s. c. 6 Law J.

¹ Nov. 19, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Cottee v. Richardson.

Rep. (N. S.) C. P. 82, where the plaintiff mortgaged land in fee, with a proviso for redemption on payment of the principal in June, 1833, but it was agreed that the mortgagee should not call in the principal until 1840, if interest were regularly paid in the mean time, and that the mortgagor should hold the premises and take the rents, issues, and profits for his own use until default should be made in the payment of the principal and interest, it was held that this deed operated as a re-demise to the mortgagor till 1840. If the plaintiff had been seized in fee, the defendant would take the legal estate under the Statute of Uses. There may be a lease, although the whole of the lessor's interest is parted with. *Pollock v. Stacy*, 9 Q. B. Rep. 1033; s. c. 16 Law J. Rep. (N. S.) Q. B. 132.

[PARKE, B. There must be a reversion in the lessor. The question is discussed in a learned note to *Spencer's case*. *Smith's Leading Cases*, vol. 2, p. 38 g.]

Very inapt words have been held sufficient to create a lease, as where a deed, purporting to be an assignment of a term, was held to be a new grant for the residue of the years yet to come. The words used being "grant, bargain, sell, assign, and set over." *Denn d. Wilkins v. Kemeys*, 9 East, 366. Lord Ellenborough there said, that there was a resuscitation of the term by the words "grant, bargain, and sell," as well as "assign," thereby intimating that "assign" would have sufficed. Here the words are "bargain, sell, assign, transfer, and set over." A covenant to stand seized has been held to amount to a lease — *Wright d. Bassett v. Thomas*, 3 Burr. 1441; so a covenant that A. should enjoy — *Wright v. Cartwright*, 1 Ibid. 282. The defendant therefore took as lessee, and is liable upon the covenants.

Watson, contra. The defendant is not liable, except in respect of the term, and that was merged by the mortgage to the plaintiff. The rent is reserved in respect of the land alleged to be leased for the residue of that term, and if the covenants to be performed are the covenants relating to that term, and if the term has ceased, the covenants are gone. *Pitman v. Woodbury*, 3 Exch. Rep. 4. No interest in fact passed to the defendant, and therefore no action is maintainable.

[PARKE, B. Here it is said that the term is resuscitated; and the defendant takes as lessee.]

It is not declared upon as a lease, but as an assignment, and the difference is essential. The incidents of an assignment and a new lease are materially different. The word "grant" is not used as it ought to have been, and then the words "set over and assign" clearly apply to an existing term, and were not intended to create a new relationship between the parties.

[PARKE, B. There is no implied covenant for the title during the period.]

No; nor any covenant for quiet enjoyment. The assignment is for the residue of the particular term. There was no intention to create the relationship of landlord and tenant. *Wilkinson v. Hall* was commented upon in *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553; s. c. 18 Law J. Rep. (N. S.) Exch. 151. Where the object of the

Cottee v. Richardson.

parties is to make an independent lease, the intention to be inferred from the whole of the deed may aid the court in putting a construction upon the words used so as to carry out that object; but in the present instance, where an assignment was clearly contemplated, there is no reason for construing it as a lease. Nor can there be a lease without the lessor has the reversion.

[PARKE, B. referred to *Barrett v. Rolph*, 14 Ibid. 348; s. c. 14 Law J. Rep. (N. S.) Exch. 308.]

Pollock v. Stacy cannot be supported.

Phipson, in reply. The argument that is drawn from the words subject to the rent reserved "in the indenture of the 23rd of September, 1830," is of no weight, because they are only used as words of designation, and it is immaterial that the term has ceased. Suppose a lease had been referred to which had expired by effluxion of time, a reference to it would only be for the purposes of identification.

[PLATT, B. The word "term" means only the period.]

PARKE, B. Suppose the defendant had been evicted, would he have any remedy?]

If that is an objection the answer is, that the parties meant that there should be a lease without a covenant for title. No other meaning can be given to the deed than that which supports the plaintiff's right of action. *Pitman v. Woodbury* is distinguishable, because there the lessee took nothing, and therefore he was not liable upon the covenants; here the defendant takes and enjoys the premises.

Cur. adv. vult.

Judgment was now delivered by —

PARKE, B. (He stated the pleadings and continued.) On the argument of this case the plea was given up, and the question was, whether the declaration was sufficient. It was admitted, for the plaintiff, and properly, that on the face of the declaration the term for fifty-five years appeared to have been merged by the lessor taking an assignment of the whole term, although by way of mortgage; but he contended that the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant has covenanted to pay the reserved rent and keep in repair during the rest of the term, and that the covenant was good in law; and we are of that opinion. The plaintiff, the lessor, by deed, set out in the declaration, in consideration of 500*l.* paid, bargains and sells the tenement of which, by reason of the merger apparent on the face of the deed, he must be taken to be seized in fee for all the residue of the term of fifty-five years after the 25th of June preceding the date of that deed. There is no doubt a valid term might be created *de novo* by bargain and sale to the defendant; the only question is whether the use of the word "term" is to prevent their operation by reason that the term had altogether ceased. We are very glad to find there is ample authority to enable us, on legal grounds, to construe this instrument so as to give effect

 Ryan v. Shilcock.

to the intention of the parties. The word "term," according to the opinion of Anderson, C. J., in *Green v. Edwards*, Cro. Eliz. 216, may be taken not only for the interest but for the time, as the residue of the term may mean so many years as should afterwards be to come; and the same doctrine was laid down by Lord Mansfield, in *Wright v. Cartwright*. If we construe the word "term," in this case, to be the number of years unexpired, and not the interest in the tenement, we give effect to the instrument, which otherwise would be void altogether, and the money which the defendant paid for his purchase lost. In the case of *Denn d. Wilkins v. Kemeys*, Lord Ellenborough appears to have had no doubt there was, under similar circumstances, what may be termed a resuscitation of the term, and the rest of the court seem to have acquiesced. It is apparent on the face of the deed that both parties supposed the term not to be merged, but they were under an error, and it is clear they both meant the defendant to enjoy the same for a certain number of years, and that intention has been carried into effect, and the defendant's covenant thereupon enforced.

In the view which we take of the case it is unnecessary to consider whether the Court of Queen's Bench were right in the view they took of the *nisi prius* decision of *Poultney v. Holmes*, 1 Str. 405, in the case of *Pollock v. Stacy*, or this court, which took a different view in the case of *Barrett v. Rolph*. It is not necessary for us to rely on the authority of the case of *Pollock v. Stacy*. Therefore, there will be judgment for the plaintiff.

Judgment for the plaintiff.

 RYAN v. SHILCOCK.¹

November 24, 1851.

Distress, when Wrongful — Opening outer Door.

A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it.

Therefore, where the door of a stable was kept closed by a padlock attached to a movable staple, and the owner and other persons usually opened the door by pulling out the staple: —

Held, that a distress made upon goods in the stable, after an entry in this mode, was legal.

Quære, whether a distress is void where the outer door is improperly broken.

CASE for a wrongful distress. The declaration contained several counts, and a count in trover, which last only became material.

Plea. Not guilty by statute.

At the trial, before Parke, B., at the first sittings for Middlesex in Trinity term, 1851, it appeared that the plaintiff was tenant to the defendant of some premises, including a stable, and rent being in arrear,

¹ 21 Law J. Rep. (N. S.) Exch. 55; 15 Jur. 1200.

Ryan v. Shilcock.

a distress was put in, and goods in the stable seized. Upon the stable-door was a padlock attached to a staple, which was loose in the external woodwork of the door, and could be easily taken out and put in again, and access to the stable was obtained by thus taking it out, and not by unlocking the padlock. The jury found that upon the occasion in question the staple was pulled out without violence, and, the entry thus effected, the distress was then made. Under the direction of his Lordship, a verdict was entered for the defendant, with leave to the plaintiff to enter a verdict for him.

A rule having been obtained accordingly —

Fortescue now showed cause.¹ It may be conceded that an outer door of a house cannot be broken forcibly open by a sheriff to execute civil process, or for a landlord to distrain, but for each of those purposes an entry may be effected in the ordinary and usual way adopted by the inmates or persons using the building. *Semayne's case*, 5 Rep. 91, a; *Duke of Brunswick v. Slogman*, 8 Com. B. Rep. 317; s. c. 18 Law J. Rep. (N. S.) C. P. 299. Thus, lifting a latch or turning a key, or, as in this case, withdrawing a staple, would be justifiable. In *Hansett v. The Sheriff of Yorkshire*,² the sheriff was held liable for negligence in not executing process because he did not obtain access to the house by getting over a wall with a ladder, the family then occupying the house having locked up the front door, and adopted this method of getting into the house.

[ALDERSON, B. Would opening a door with a picklock be violence?]

Yes; because that would not be the usual way of entering the house. It is said, in Com. Dig. "Execution," C, 5, that a sheriff cannot open the door, though it be only latched; but the authorities there referred to do not support the proposition.³

[PARKE, B. In Co. Litt. 161, a, it is laid down that a landlord cannot break open gates or break down inclosures to take a distress.]

That passage relates to violence equivalent to a disseisin. In Vin. Abr. "Distress," E, 2, it is cited with the words "fling open," instead of "break open." In *Brown v. Glenn*, 20 Law J. Rep. (N. S.) Q. B. 205; s. c. 2 Eng. Rep. 275, it was held, indeed, that a barn can no more be broken open than a house; but *Penton v. Browne*, 1 Sid. 186, is an authority to the contrary. The court there held that in an action of trespass for entering the barn of the plaintiff, the defendant, having justified under a *fi. fa.*, the door being open, a replication that the door of the barn was shut, was bad; thus showing that the sheriff might open the door without violence.

[PARKE, B. It may have been decided on the ground that in justifying the taking of goods in execution, in a *barn*, it is immaterial

¹ Nov. 18. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

² Not reported, but now cited *ex relatione* Hugh Hill and Watson.

³ The authorities are, *Semayne's case*, 5 Rep. 92, Cro. Eliz. 909, Moore, 668, Yelv. 28 but these are placed in Com. Dig. as authorities that "the sheriff cannot break a house." and the next paragraph is, "neither can he open the door," &c.

Ryan v. Shilcock.

whether the door be open or shut.¹ Then, as to the other point; in *Semayne's case* it is said that if a sheriff improperly breaks an outer door in execution, that execution is good although he is guilty of a trespass in breaking the door; and that dictum is founded upon the Year Book, 18 Edw. 4, 4, a. All the authorities are referred to in a learned note in the last edition of Smith's Leading Cases, vol. 1, p. 46, b.]

Kerbey v. Denby, 1 Mee. & W. 336; s. c. 5 Law J. Rep. (n. s.) Exch. 162, is an authority to the contrary.

[PARKE, B. It was not necessary to decide the point in that case.]

The Duke of Brunswick v. Slowman would not have been decided as it was if the execution had been held good.

Humfrey and Prowett, in support of the rule. The sheriff is not justified in breaking open the door by force, for the principle is, that every man's house is his castle. The question is, whether the door is open or shut, and the circumstance that the occupier enters in a particular way is immaterial. Suppose he chose to enter by the window, would that justify the sheriff or landlord in doing the same?

[PARKE, B. A distress may be made *per fenestras*.]

Brown v. Glenn is a distinct authority in favor of the plaintiff. Here the staple was fixed to the freehold, and could not be removed without violence.

[POLLOCK, C. B. Was the door intended to be fastened or merely closed?

PARKE, B. It is analogous to a door just closed with a latch.]

An entry by lifting the latch would be sufficient to constitute burglary. Com. Dig. "Execution," E, 5, already referred to, shows the illegality of this entry, and the execution is altogether void. *Brown v. Glenn*.

[PARKE, B. In that case, *Semayne's case*, and the 18 Edw. 4, 4, a, were not cited upon this point. In Vin. Abr. tit. "Replevin," A, a, 9, there is a case that in replevin for breaking doors and making a distress the plea need not answer the breaking of the doors, but the reason may be that that allegation is immaterial in the count, for it ought to be stated by way of reply.]

They referred also to Fitzh. Abr. tit. "Distress," pl. 21, and *Wallace v. King*, 1 H. Black. 13. *Cur. adv. vult.*

The judgment of the court was now delivered by—

POLLOCK, C. B. The question in this case turns on the power of a landlord in making a distress, i. e. how far he is justified in making an entry into premises for that purpose, where no more force is necessary than the ordinary force requisite to open a door which is fastened in order to keep it closed, and not for the purpose of keeping persons

¹ The court, in the case cited, said that the barn must be inferred to be in a field, and not parcel of a house, but they agreed that if it adjoined and was parcel of a house, it could not be broken into. "*Ne poest estre infringed*."

Ryan v. Shilcock.

out. According to the evidence in the present case the door had on it a padlock with a staple, and the mode in which the owner and every one else opened the door in order to get in was by pulling out the staple, which served the purpose of the button or nail which we sometimes find used for keeping gates "shut," an ambiguous word which signifies either a mode of preventing a door from opening of itself, or of preventing its being opened except by those who have the key, or by force and violence. The jury having found that this padlock and staple were not placed there with intent to keep the door fastened, but only closed, and the verdict not being objected to as against evidence, the question resolves itself into this, whether a landlord, who on coming to premises for the purpose of distraining, finds the outer door closed but capable of being opened by lifting a latch, is justified in so doing. We think that he has authority by law to open the door in the ordinary way in which other persons could do it, when it is left so as to be accessible to all who have occasion to go into the premises. In the 1 Inst. 161, a, Lord Coke writes thus on the term "Enclosure," which is explained in the 237th section of Littleton, on whom he is commenting: "Enclosure . . . for the lord cannot break open the gates, or break down the inclosures to take a distress; and, therefore, the law accounts it a disseisin." Now, of the two matters thus taken together, the breaking down the inclosures is clearly equivalent to a forcible entrance; and we think that the breaking open the gates must be understood to mean a breaking with that degree of violence which is equivalent to such; for Coke speaks of it as amounting to a disseisin. He then goes on: "But all these are intended by Littleton to be disseisins after an actual seisin had; and when the rent is behind; otherwise none of these are disseisins at all." Now, there is a passage in Fitzh. Abr. tit. "Distress," pl. 21, as follows: "Nota, that a man came to the stable of his tenant to make a distress, and when he came the door was shut with a bar, and he put in his hand to a hole (*il mill eins sa main a un ptuz*) and took away the bar and opened the door, and entered and took two cows in the name of a distress, and because he opened the door in this manner it was adjudged that the distress was tortious." This case very much resembles that of a man who, in finding a hole in a door or pane of glass puts his hand in to remove the fastening of the door or window, and so gets into the premises, which no doubt amounts both to burglary and trespass, seeing that it is not the accustomed way of getting in. The authority of Lord Coke is, therefore, in favor of the defendant, and the case from Fitzherbert to the contrary turns out not to be accurate. We may observe that as to the passage referred to during the argument in Com. Dig. "Execution," that the sheriff may not open a latch, there is no reference to any authority in support of it, and it is clear that the cases cited do not support that proposition. See *supra*, note 5. However, that passage applies only to a sheriff entering a dwelling-house under an execution. On the other point made in this case, it becomes unnecessary to pronounce an opinion.

Rule discharged.

Gough v. Tindon.

GOUGH v. TINDON & another.¹

November 8, 1851.

Promissory Note—Delivery after Death of Maker—Account stated—Payment under mistake as to legal Liability.

A, at his death, left among his papers two letters sealed, and directed to the plaintiff (who had been his housekeeper for some years, but had left his service after giving birth to a child, of which he was the father) containing two promissory notes for 400*l.* and 200*l.* respectively. In one letter the note was said to be "in consideration of the long and faithful services of the plaintiff;" in the other he had written "in addition to any sum I owe you I inclose 200*l.* as a mark of my respect." The defendants, who were the executors of A, paid 200*l.* after his death, on account of these notes to the plaintiff, and promised, in writing, to pay the residue, but subsequently declined to do so; and the plaintiff brought an action of assumpsit against them, in which were counts upon the notes, and a count upon an account stated with the defendants as executors:—

Held, that the testator's estate was not liable in respect of the notes, as they had not been delivered by him to the plaintiff, and could not operate as testamentary dispositions, because not in conformity with the 1 & 2 Vict. c. 26, (the Wills Act;) and:—

Held, also, that the defendants were not liable upon the count for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration.

ASSUMPSIT against the defendants as executors of one Clarke. The first two counts were upon promissory notes for 400*l.* and 200*l.* respectively, made by the testator in favor of the plaintiff, and there was also a count upon an account stated with the defendants as executors.

Plea. The general issue.

At the trial, before Parke, B., at the Warwick Summer Assizes, 1851, it appeared that the plaintiff had been for many years in the service of the testator as housekeeper, but had left after having had a child by him. At his death the defendants, who were his executors, found among his papers two letters sealed and directed "for Sarah Gough, my late servant," one of which contained the promissory note for 400*l.* The letter stated that it was "in consideration of her long and faithful services," and that his executors would pay her the amount of the note. There was also another letter similarly addressed, and inclosing the note for 200*l.*, and in the letter there was the following passage: "In addition to any sum I owe you, I inclose you 200*l.*, as a mark of my respect;" and there was also a recommendation that the amount should be invested for the benefit of the child. The notes and letters were in the handwriting of the testator, and were handed to the plaintiff by the defendants, who afterwards paid to the plaintiff 200*l.* on account of the notes, and promised by letter to pay the remainder, but subsequently they declined to do so, and thereupon the action was brought. His Lordship directed the plaintiff to be nonsuited, being of opinion that the notes were invalid, as they could only operate as testamentary dispositions, and as such were void under the 1 & 2 Vict. c. 26, (the Wills Act;) and that the executors having acted under a mistake of law as to their liability, there was no evidence to support the account stated, and no consideration for their promise to pay.

¹ 21 Law J. Rep. (N. S.) Exch. 58.

Tharrett v. Trevor; *In re Underwood*.

Humfrey now moved to set aside this nonsuit, and for a new trial. The consideration for the notes was expressed in the letters, which referred in distinct terms to the work and services of the plaintiff, and the conduct of the executors was such as to render them liable upon an account stated.

[PARKE, B. The notes were invalid as notes for want of delivery in the testator's lifetime, and they could not operate as testamentary dispositions, because they were not attested in conformity with the Wills Act. The executors had paid under a mistake as to their legal liability.]

Suppose there was a debt upon a promissory note which could not be given in evidence because improperly stamped, why should not the executors be bound by a promise in respect of the amount of such a note? Suppose the words had been, "I owe you two hundred pounds," there would have been evidence of the testator's liability; and the letters in this case are equivalent to a distinct admission. A count for work and labor was struck out of the declaration by order of a judge at chambers.

[PARKE, B. Had it been retained, it would have been a question for the jury, whether the services were rendered on the footing of payment.]

POLLOCK, C. B. The nonsuit was right. The notes were meant only to operate after the testator's death, but this intention was defeated by the Wills Act; and the promise of the defendants was made only with reference to their supposed liability upon those notes.

PARKE, B. There is no account stated of money due and owing. There is *prima facie* such an account stated; but when it is explained that the promissory notes are not due, the account stated is shown not to be of money due and owing.

ALDERSON, B., and MARTIN, B., concurred.

Rule refused.

THARRETT v. TREVOR; *In re Underwood*.¹

December 5, 1851.

Attorney — Undertaking — Lien.

A, an attorney, on obtaining from B, another attorney, the papers belonging to a former client of B, wrote to B as follows: — "Out of any moneys which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due of your bill of costs as settled at 9l." : —

Held, that A was bound upon this undertaking to pay over to B the amount of the costs due to him from the first moneys he should receive on account of the client, without deducting therefrom any costs that might be due to himself for recovering such moneys, or otherwise.

¹ 21 Law J. Rep. (N. S.) Exch. 59.

Tharrett v. Trevor; In re Underwood.

THIS was a rule calling upon A. O. Underwood, an attorney of this court, and attorney for the plaintiff in the above cause, to show cause why he should not pay to W. T. Ellaby the sum of 7*l.* 16*s.* pursuant to his undertaking, which he had given to W. T. Ellaby upon receiving from him certain papers belonging to the plaintiff in the above action.

It appeared upon the affidavits that W. T. Ellaby had been the attorney for the plaintiff, and having required payment of his bill, Mr. Underwood had written to him the following letter:—“Dear Sir,—I had advised the plaintiff to pay to you the sum of 2*s.* per week, the sum mentioned in your favor of this date, which she has agreed to do (without any more.) Out of any moneys which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due of your bill of costs as settled at 9*l.*

(Signed) “A. O. UNDERWOOD.”

The action had proceeded and moneys had been received on account of the plaintiff, by Mr. Underwood, and he had been applied to for the sum of 7*l.* 16*s.*, which remained due to Mr. Ellaby out of the 9*l.* above mentioned. This, however, he did not do, and the rule was thereupon obtained, against which

Bramwell showed cause,¹ and

Simon was heard in support of the rule.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. We took time to look into the affidavits, and to consider the effect of the undertaking. The undertaking was upon the handing over of certain documents, and was in the following terms: (His Lordship read the letter set out above, and proceeded:) The papers were handed over to Mr. Underwood, who undertook the conduct of the suit from that time. The suit has now come to a close, and he is entitled to receive, or has received, the proceeds, from the defendant. The learned counsel on showing cause set up for the first time—because that never appears to have been set up in the correspondence, nor was the objection ever made in the affidavits—that his client was only bound to pay out of the surplus, after deducting his own bill as an attorney, for which he had a lien upon the sum recovered; and a doubt was entertained at the time of the argument, whether that was the meaning of this contract or not. We have all of us considered it, and we are all satisfied that there was an obligation on Mr. Underwood to pay out of the moneys he received, without insisting on his own lien, and therefore the rule must be made absolute.

Rule absolute.

¹ November 22, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Doe d. Dixie v. Davies.

DOE d. DIXIE v. DAVIES.¹

November 25, 1851.

Mortgage — Tenancy at Will.

A mortgage contained a power of sale and then a proviso and covenant, by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent in lieu of and as interest upon the mortgage money. The mortgagor remained in possession of the premises, but no livery of seisin was made to the mortgagee. Prior to the commencement of the action, there was a demand of possession, but no notice to quit was ever given to the mortgagor:—

Held, that the effect of the deed was to create a tenancy at will only; and that a demand of possession, without any notice to quit, was sufficient to entitle the mortgagee or his assignee to maintain ejectment.

EJECTMENT by the assignee of a mortgagee against the mortgagor.

At the trial, before Williams, J., at the Glamorganshire Spring Assizes for 1851, it appeared that the premises in question had been mortgaged in fee by the defendant to one John Turner as a security for 1100*l.*, by a deed, dated the 9th of February, 1838, which mortgage was subsequently assigned to the lessor of the plaintiff, by a deed, to which the mortgagee was a party, subject only to the equity of redemption. The day of redemption fixed in the mortgage-deed was the 9th of February, 1839, and it contained a power of sale in default of payment of the sum secured; which was immediately followed by this proviso, "Provided always, nevertheless, and it is hereby declared and agreed, and he the said John Turner doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said David Davies, (the defendant,) his heirs, executors, administrators, and assigns, that no sale or public notice or advertisement of or for any sale of the said premises, or any part thereof, shall be made or given by the said John Turner, his heirs, executors, administrators, or assigns, nor any means by him or them be taken for obtaining possession of the same premises, or any part thereof, until the expiration of twelve calendar months after notice in writing of his or their intention to sell or obtain possession thereof shall have been given to the said David Davies, his heirs or assigns, or left at his or their last or usual place of abode."

There was also the following covenant:—"And the said John Turner doth hereby for himself, his heirs, executors, administrators, and assigns, covenant that he the said David Davies, his executors, administrators, and assigns, shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuages or tenements, lands and hereditaments, with the appurtenances, as tenant or tenants thereof at will to the said John Turner, his executors, administrators, and assigns, yielding and paying for the same to the said John Turner,

1 21 Law J. Rep. (N. S.) Exch. 60; 16 Jur. 44.

Doe d. Dixie v. Davies.

his executors, administrators, and assigns, yearly and every year, the clear annual sum of 55*l.* by two even and equal half-yearly payments in the year, and on such days and times as hereinafter is mentioned, for and in lieu, satisfaction, and discharge of the like annual sum of 55*l.*, as and for the yearly interest of the said sum of 110*l.*, the first payment thereof to begin and be made on the 9th of August next ensuing the date of these presents."

No livery of seizin was made to the mortgagor, who continued in possession of the premises as before the mortgage, paying the 55*l.* annually. Previous to the ejectment being brought, there was a demand of possession¹ by the lessor of the plaintiff, but no notice to quit as upon a yearly tenancy was given. Upon these facts, it was objected that the action was brought prematurely, as the effect of the deed was a redemise of the premises to the defendant upon a tenancy from year to year, determinable upon twelve months' notice. His lordship overruled the objection, and directed the verdict to be entered for the lessor of the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly,

Davison and *Bowen* now showed cause.² The clauses in the deed which are relied on by the defendant, do not give him any interest as a tenant from year to year, so as to entitle him to a notice to quit. If the mortgage deed created a tenancy at will, then the assignment was a determination of that tenancy, for the tenant was a party to that assignment, which was subject to the equity of redemption only.

Grove, in support of the rule. This is not a tenancy at will, but either a tenancy from year to year, or a tenancy until it is determined by twelve months' notice. The reservation of rent in the second proviso has this effect. *Richardson v. Langridge*, 4 Taunt. 128.

[*PARKE, B.* There may be a tenancy at will, although a yearly rent is reserved, as is laid down in Co. Lit. 556. A tenancy from year to year is where a man occupies one year, and then for another year. He is considered to continue on the same terms from year to year. In *Walker v. Giles*, 6 Com. B. Rep. 662; s. c. 18 Law J. Rep. (N. S.) C. P. 323, a clause that the mortgagors should become tenants to the mortgagees of the demised premises during their will at a yearly rent, was held not to create a yearly tenancy.]

That is an authority in favor of the defendant, because the decision rested upon such a tenancy being inconsistent with the general scope of the deed. Here the intention of the parties was that the mortgagor should not be turned out without twelve months' notice. An agreement by which the tenant is always to be subject to quit at three months' notice, is a quarterly tenancy, determinable on a three months' notice to quit, expiring at the same time of the year as it commenced, or any other quarterday. *Kemp v. Derrett*, 3 Camp. 510. The lessor

¹ This fact is taken from the statement in the judgment.

² November 18, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Doe d. Dixie v. Davies.

of the plaintiff takes the mortgage, subject to the existing tenancy of the defendant created by the original mortgage deed. No notice to quit having been given, he is not entitled to the possession of the premises.

Cur. adv. vult.

Judgment was now delivered by —

POLLOCK, C. B. We are of opinion that the rule to enter the verdict for the defendant must be discharged. The question turns upon what estate or interest Davies had by reason of a certain indenture of the 9th of February, 1838, which was an indenture of mortgage; and it was contended that this indenture created an interest that could not be put an end to by a mere demand of possession. The ground that there was no demand of possession failed when the facts came to be inquired into, and the learned judge's notes were brought before us, because although undoubtedly there had been no notice to quit, and therefore if a notice to quit were necessary, we should have been obliged to enter a verdict as prayed for by the defendant; but it turned out that there had been a demand of possession. Now, there are two parts of the indenture which it is necessary to advert to on giving the judgment of the court. The first is a proviso, "that no sale or public notice or advertisement for any sale of the said premises or any part thereof shall be made or given by the said John Turner, his heirs, executors, administrators, or assigns, or any means by him or them taken for obtaining the possession of the same premises or any part thereof until the expiration of twelve calendar months after notice in writing of his or their intention to sell or obtain possession thereof should have been given to the said David Davies, his heirs, or assigns, or left at his or their last usual place of abode." The mortgagor, therefore, under this clause holds at the will of the mortgagee, but is not thereby rendered tenant at will to him, for, in order to constitute that relation, the tenancy must be determinable at the will of either party. The uncertain nature of the mortgagor's interest here mentioned rather shows that he was tenant for life, if any thing, but as there was no livery of seizin, that cannot be, and the clause certainly does not create any definite term in the mortgagee for life. The other clause is — "And the said John Turner doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree that David Davies shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuages and tenements as tenant or tenants thereof at will to the said John Turner, his executors, administrators, or assigns, the said David Davies yielding and paying for the same the annual rent, &c. But this is not inconsistent, for no doubt the tenancy at will may be coupled with a yearly rent during the time of the occupation. It follows, therefore, that this was not an estate for life; not an estate for years, but a tenancy at will, and that will being determined by the demand of possession, the action of ejectment is well brought. The verdict was right, and therefore the rule must be discharged.

Rule discharged.

 Bellamy v. Majoribanks.

BELLAMY & another v. MAJORIBANKS & others.¹

February 6, 1852.

Banker — Crossed Check — Negligence.

The crossing of a check payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check that the banker upon whom the check is drawn ought not to pay it except through a banker; for if he does so, and the person actually presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount.

The banker's duty is the same where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it.

In an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a check on the defendants, crossed thus, "Bank of England, for account of the Accountant General." The payee to whom this check was delivered struck out the crossing by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers, and paid it into their bank to the credit of his own account. The check being presented by them for payment was paid by the defendants, who charged it to the debit of the plaintiffs' account. The payee appropriated the sum so received to his own purposes, and it never was paid to the Accountant General; and the plaintiffs, who were trustees, were obliged to pay the amount themselves:—

Held, that the circumstance of this check being thus doubly crossed afforded no additional evidence of negligence against the defendants.

ASSUMPSIT. The first count of the declaration stated, that whereas the defendants, before and at the respective times of the making of the promises in this count mentioned, carried on the business of bankers in copartnership, namely, under the style of Messrs. Coutts & Co., viz., at Westminster, in the county of Middlesex; and thereupon, heretofore, to wit, &c., in consideration that the plaintiffs, at the request of the defendants, would retain and employ the defendants in the way of their business, and would deposit money with them as such bankers, to be drawn out by drafts or checks, to be drawn by the plaintiffs upon the defendants, under the style aforesaid, in that behalf, they, the defendants, promised the said plaintiffs that they, the said defendants, so long as they should be so employed by the plaintiffs as aforesaid, would perform their duty as such their bankers as aforesaid; that the plaintiffs relying on the said promise of the defendants, did, to wit, &c., and for a long time then next, namely, until and after the breach of duty hereinafter mentioned, retain and employ the defendants as such bankers as aforesaid, and during the time aforesaid and before the breach of duty aforesaid, to wit, &c., deposited with the defendants, as such bankers as aforesaid, and they, the defendants, received and at the respective times of the drawing and presentation as hereinafter mentioned of the draft or check in this count after mentioned had in their hands, as such bankers, moneys

¹ 21 Law J. Rep. (N. S.) Exch. 78; 16 Jur. 106.

Bellamy v. Majoribanks.

of the plaintiffs', more than sufficient to pay the draft or check in this count after mentioned, and amounting in the whole to a large sum of money, to wit, 5000*l.*; that afterwards, and whilst the defendants were so employed by the plaintiffs as such bankers as aforesaid, and whilst the defendants, as such bankers so employed as aforesaid, had in their hands such sums of money, to wit, &c., they, the plaintiffs, drew and signed and subscribed with their names a certain draft or check on the said defendants as such bankers as aforesaid, under the style aforesaid, commonly called a check on a banker, to wit, in the words and figures following, to wit: "London, June 23, 1845. Messrs. Coutts & Co., please to pay Mr. Edward Bryant Geary or bearer two thousand five hundred and ninety-six pounds, seventeen shillings. 2596*l.* 17*s.*;" that afterwards, and before the delivery of the said draft or check to the said Edward Bryant Geary therein mentioned, the plaintiffs crossed the said draft or check in a certain manner, according to the custom and usage of bankers in that behalf, and thereby, according to the said custom and usage, directed the amount of the said draft or check to be paid by the defendants, as such bankers as aforesaid, into and through the hands of a certain corporation, carrying on business as bankers in London, to wit, under the style of "The Governor and Company of the Bank of England:" and thereby specified to what purpose the said corporation should apply the same, and then delivered the said draft or check so crossed as aforesaid to the said Edward Bryant Geary; of all which premises the defendants, then and before the payment of the said draft or check as hereinafter mentioned, had notice; and thereupon it became and was the duty of the said defendants, as such bankers so employed as aforesaid, not to pay the amount of the said draft or check otherwise than into and through the hands of the said corporation so carrying on the business of bankers as aforesaid, to wit, the said Governor and Company of the Bank of England. Nevertheless, the said defendants, in breach of their said duty as such bankers as aforesaid, afterwards, and whilst they were so employed by the plaintiffs as such bankers as aforesaid, to wit, &c., wrongfully and improperly paid the amount of the said draft or check, to wit, the said sum of money therein mentioned, otherwise than into and through the hands of the said corporation, to wit, by their paying the amount of the said draft or check into the hands of certain persons, carrying on business under the style of Messrs. Gosling & Co., then being the agents of the said Edward Bryant Geary in that behalf; by means of which said premises the said Edward Bryant Geary was enabled fraudulently to misapply and convert to his own purposes, and did then, in fact, fraudulently misapply and convert to his own purposes, the said sum of money in the said draft or check mentioned; and the said Governor and Company of the Bank of England were prevented from receiving the amount of the said draft or check and applying the same, to wit, on behalf and on account of the plaintiffs to the said purpose referred to in and by the said crossing of the said draft or check as they otherwise would have done, and the amount of the said draft or check, by means of the premises, became and was and is wholly lost to the plaintiffs.

Bellamy v. Majoribanks.

The only other count in the declaration material to notice was a count for money lent.

The defendants pleaded (*inter alia*) to the first count that there was no such custom or usage of bankers as alleged therein, and also that they did not wrongfully pay the amount of the check otherwise than into and through the hands of the Bank of England. Issues thereon.

There was also a plea, setting out specially the circumstances under which the payment was made to Messrs. Gosling, which were proved at the trial as detailed below. Replication *de injuriâ*, and issue thereon.

To the other count the defendants pleaded payment, and issue thereon.

At the trial, before Martin, B., at the sittings after Trinity term, 1851, for Middlesex, the following facts were proved:—The plaintiffs were trustees of a gentleman called Frank, who had died a lunatic, and they had opened an account with the defendants, Messrs. Coutts, for the purpose of the trust. A suit was pending in the Court of Chancery with reference to the trust, in which a Mr. Triston acted as solicitor for the plaintiffs; the other parties to the suit were the next-of-kin of Mr. Frank, and a Mr. Geary acted as solicitor for them. In June, 1845, Mr. Geary brought to Mr. Triston a check upon Messrs. Coutts, written out by him, for 2,536*l.* 17*s.*, to be signed by the plaintiffs; it was then delivered to Mr. Triston in the common form. Mr. Triston sent the check to the plaintiff, Mr. Bellamy, at Brighton, who returned it, signed with the following addition, in his own handwriting, namely, at the end of the body of the check, the words "General Unpaid Costs Account," and crossed as follows: "Bank of England, for the Account of the Accountant General." Mr. Triston then sent it to the other trustee, the plaintiff, Mr. Foster, to be signed by him, and having received it back delivered it to Mr. Geary. In point of fact, the department of the Bank of England, in which the business of the accountant general is conducted, would not have received this check, it being the rule not to receive any check unless it be drawn on the Bank of England itself. The rule is well known among the London bankers. Upon the day on which Mr. Geary received the check, he struck out the crossing made by Mr. Bellamy by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of Messrs. Gosling, his own bankers, and paid it into their bank to the credit of his account. Upon the following day, the clerk of Messrs. Gosling presented it for payment to Messrs. Coutts & Co., who paid it, and charged it to the debit of the plaintiffs' account. The money was paid by Messrs. Gosling to the credit of Geary in his account with them. He never paid the money to the accountant general, and the plaintiffs were obliged to make it good. This action was brought to recover from the defendants the sum so paid by them. The plaintiffs alleged that there was such a custom or usage as was referred to in the first count, which was absolutely obligatory on all bankers; but, assuming that they failed in establishing such custom, they insisted

Bellamy v. Majoribanks.

that the defendants were guilty of negligence in paying the check crossed in the manner in which it was, and that the defendants could not, therefore, rely on the plea of payment, which was their only available answer to the count for money lent. A number of the most eminent bankers, and the most experienced bankers' clerks in London were examined on both sides as to the alleged custom, and incidentally as to the alleged negligence, and ultimately the jury expressed their opinion that the defendants were guilty of negligence in paying the check to Messrs. Gosling, and, in answer to a written question, stated that there was a custom and usage, and consequent duty upon the defendants not to pay the check otherwise than into and through the hands of the Bank of England.¹

A verdict was accordingly entered for the plaintiffs, to set aside which, and for a new trial, a rule was subsequently obtained, and against this rule,—

The Attorney-General, (Sir A. Cockburn,) Knowles, and Unthank, now showed cause.² The plaintiffs rest their case upon both counts. The jury have distinctly found that there was negligence on the part of the defendants, and this entitles the plaintiffs to a verdict upon the first count as to the custom, and also upon the *indebitatus* count, because the defendants must discharge themselves by showing a valid payment. Even if the custom alleged in the first count be not established, still upon the plea of payment the plaintiffs are entitled to succeed, as a payment which the jury have declared to be negligent cannot be relied upon by the defendants as an answer to the claim of the plaintiffs to have their money refunded. The intention of the plaintiffs was clearly indicated by the crossing, which showed that the amount of the check was to be paid to the account of the accountant general with the Bank of England, to go to the unpaid costs account, and as clearly that Mr. Geary was not to receive it on his own account, which however he did do, and they must lose the money unless they can recover in this action.

[ALDERSON, B. But is it not the fact that the plaintiffs in drawing that check intended an impossibility?]

That may be; but as between them and their own bankers their intention was manifested, and it ought not to have been disregarded. The defendants should have communicated with the plaintiffs before they paid the check. Suppose that they had sent the check to Mr. Geary without any crossing at all, and at the same time written to the bankers, and said, "We have sent that check to Mr. Geary, but with instructions to him to pay it in to the account of the accountant general, and not to put it to his own private account, and we write to

¹ At the trial, Martin, B. had also put down in writing this question: "Assuming the defendants were not restricted to paying the check to another banker than the Bank of England, did they use due care and diligence in the payment of the check to Messrs. Gosling?" but this question was not actually put, as his lordship thought that it was unnecessary after the answer to the first question.

² January 17, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

Bellamy v. Majoribanks.

say that if it should be presented by bearer you are not to pay it;" the bankers would not have been justified in disregarding such instructions. The crossing in the present instance was equivalent to this, and the defendants were found by the jury to have been guilty of negligence, and therefore, without reference to the proof of the custom in the first count, the plaintiffs are entitled to succeed upon the plea of payment.

[ALDERSON, B. Was it the fact that the defendants knew that the words "Bank of England, to the account of the Accountant General," were in the handwriting of Mr. Bellamy?]

There was no doubt of that.

[POLLOCK, C. B. The bankers must be presumed to know the handwriting of their clients, and therefore to know what is and what is not their handwriting.]

The addition of the words "general unpaid costs account" would show still more clearly that the money was not to be paid to Mr. Geary himself. But, looking at the legal effect of this document, it is submitted that there may be an order upon a banker to pay, limited in a particular manner, just as a bill of exchange may have a restrictive indorsement, a question which was discussed and decided in *Sigourney v. Lloyd*, 8 B. & C. 622; s. c. 7 Law J. Rep. K. B. 73; and in error, 5 Bing. 525, where all the authorities are collected. The banker has the money of his customer in his hands, and ought only to pay it according to his directions.

[ALDERSON, B. The defendants say that the essential part of a check is that it is payable to bearer, and that they have so paid this check.

PARKE, B. The custom of bankers is to pay the bearer, and they are protected in the ordinary course of payment. There is no custom obliging them to pay to any individual named, because they must then at their own peril ascertain his identity.]

The evidence was sufficient to show that the payment was not according to custom, without making inquiry. But there is another mode of considering this question. It is immaterial whose name is in the body of the check, as the important word is "bearer." Then the customer to whom the bankers owe allegiance write upon it what is equivalent to "Pay to the Bank of England;" and that is very different from a crossing by a mere holder of a check. The banker owes no duty to the holder, and is liable to no action at his suit if the check is not honored; and if the first or any subsequent holder chooses to strike out the crossing which the customer has put and puts the name of his own banker he may do so, as he is the proprietor of the check; but the banker is in no way bound to pay it unless satisfied, after proper inquiries, that the alteration has been made by the lawful holder; and if he does pay it without due caution he pays at his own peril. The question really is, whether the banker may disregard entirely the direction of his customer. It may be said on the other side, that if the effect of the crossing by the customer is to restrict the negotiability of the check from bearer to bearer, it is void in consequence of the Stamp Laws. But although this might be a sufficient justification to the banker if he refused to pay the check at

Bellamy v. Majoribanks.

all, it does not excuse his paying it contrary to the customer's directions. If it be said that the payment was justified by the custom of bankers, then the defendants failed to prove any such custom totally to disregard the directions of the customer, and its validity therefore need not be discussed. The money count is, however, chiefly to be relied on, because the sufficiency of the first count is very doubtful. In considering the question of negligence, it is not to be forgotten that the body of the check is in a different handwriting, and the handwriting which they ought to attend to is the handwriting of their customer, and he has put the restriction on the word Geary; and in fact, Mr. Geary never had any interest in the check. He had only authority, as any other servant might have had, to take that check to the Bank of England, and unless Messrs. Coutts were satisfied that it came to them through the Bank of England they are not entitled to any credit for having had it.

Channel, Serjt., and Sir J. Bailey, in support of the rule. The rule must be made absolute, because the finding of the jury as to negligence was against the evidence actually given, and also because there could be no negligence if in point of law the defendants were justified in paying the check. To establish this, it is necessary to consider the nature of the check. It was an order of the customer on his bankers to pay "Mr. Geary or bearer," that is, in this particular case, to pay Mr. Geary himself, as his bankers were the bearers, and this direction was literally complied with. What, then, is there to prevent this payment being valid as against the drawer of the check? The first crossing was "Bank of England, for account of Accountant General," but the last words were of no influence whatever in restricting the nature of the check. Then, the words "Bank of England" can only have a legal effect by convention; but any custom to contradict the clear meaning of a written instrument is invalid. Custom may be referred to to explain an instrument, or more strictly speaking, to apply its terms to the right subject-matter, but not to contradict it; and upon this ground alone the crossing would have no legal effect whatever, because it purports to contradict each of the matters required in the order; it contradicts the right to pay Mr. Geary; it contradicts the right to pay the bearer, and destroys the negotiability of the check altogether. *Sigourney v. Lloyd*, rightly understood, illustrates this proposition. A bill of exchange, payable to order of the drawer, indorsed in blank, becomes a negotiable instrument, because the indorsement in blank makes the instrument payable to bearer. If it comes into the hands of another person, the person receiving it may specially indorse it; and if a holder were to sue that party who has specially indorsed it, he must sue him through the special indorsement that he has made; but if any other party is to be sued, as the drawer, for instance, or the acceptor or prior indorser, the special indorsement does not destroy the negotiability which the bill had acquired by having once been indorsed in blank.

[*POLLOCK, C. B.* No doubt that is the law, but the general view of the mercantile world is different, and they think that if a bill is limited in that way, they are bound to consider the limitation.

PARKE, B. The owner of a bill indorsed in blank may, however, convert the blank indorsement into a special indorsement, by writing "pay to myself or order." The law is laid down by Lord Chief Justice Holt, in *Clerk v. Pigot*, 12 Mod. 192.]

There is another equally conclusive argument against this crossing being held to be a restriction, drawn from the Stamp Act. The check is only exempt from stamp, because it is payable "to bearer;" and whether the custom alleged restricts the payment to the banker first specified by the customer, or makes it requisite that some banker should present the check for payment, equally nullifies the provisions of the Stamp Act, because the check is no longer payable to any bearer. The learned counsel then analyzed the evidence, to establish that it did not support the finding of the jury, and relied also upon the fact that as the check was presented through a banker, the defendants had complied with the substantial intention of a check being crossed, viz., to enable the parties interested afterwards to trace the payment of it.

Cur. adv. vult.

Judgment was now delivered by —

PARKE, B. On a previous day we intimated that there ought to be a new trial in this case, on the ground that the evidence given on the trial was not satisfactory to support the verdict pronounced by the jury; and if this were an ordinary case of setting aside a verdict on such a ground, we should, probably, have confined ourselves to merely expressing our opinion to this effect. But there is involved in the present controversy a most important question with respect to checks on bankers, and it seems to us, therefore, that it is right to state with some particularity the nature of the question to which the attention of the jury must be called on the new trial.

Payment by checks has now almost entirely superseded all other modes of payment in large, and is in very general use in smaller money transactions; and the practice of crossing them with the name of bankers, the effect of which is the question in the present case, is also in very general use, and occurs in very many instances every day, not only in London, but in all other parts of the kingdom. It therefore seems to us to be of great importance that the effect of these crossings should be rightly understood. [Having stated the substance of the pleadings and the facts proved at the trial, his lordship proceeded.] A new trial has been moved for, on the ground of misdirection, and the verdict not being supported by the weight of evidence. The whole question, both as to the law applicable to the case, and as to the facts, has been lately argued, before us, with great ability,—that is, before the rest of the court, in the absence of my Brother Platt, and this is the judgment of the Lord Chief Baron and my Brothers Alderson and Martin, and myself. The objection as to misdirection was abandoned by the learned counsel for the defendants, but it was insisted that the verdict on the first count and on the plea of payment to the second count was against the evidence, and we are of that opinion. The plaintiffs first contended that the cross-

Bellamy v. Majoribanks.

ing of the check to the "Bank of England" in the manner in which it was crossed, absolutely restricted the negotiability of the instrument, and rendered it payable to the Bank of England alone, and even to the account mentioned, namely, "The Accountant General," and to no other person; and that a binding custom or usage to that effect was proved. We are of opinion no such usage or custom was proved. Without going the length of saying that there was no evidence to go to the jury of the existence of such a custom, we think that the weight of evidence was against it. A custom such as that alleged in the first count would be binding and obligatory on all persons engaged in a certain trade, because long and universally acted upon by all persons in such trade, who may, therefore, reasonably be presumed to have made their contracts upon the faith of it. The custom alleged could only be proved by a long, well known, acknowledged, and universal usage and practice among bankers to act in accordance with it. So far from this being the case, many witnesses called from the different London banking-houses by the plaintiffs, and all called by the defendants, denied its existence. That there was any special usage between the plaintiffs and Messrs. Coutts which would, of course, govern their transactions, was never once suggested. The banking business in London is not in very many hands, and all the witnesses on both sides were persons of unimpeachable integrity and veracity, and it seems to us quite absurd to suppose that there could be any custom creating such a duty as that alleged in the first count, and absolute and binding by reason of long and universal usage on all the bankers in the metropolis, without those gentlemen being well acquainted with it. The verdict was, therefore, upon this point against the weight of evidence.

We are also of opinion that such a custom, if proved to have existed in fact, would be incapable of being supported in point of law. The crossing a check could not operate as an indorsement to a banker whose name is used, because it was not written with any intent to transfer the property in the check to him, and it wants the essential part of an indorsement, the delivery of the instrument to the indorsee. And we think that it cannot be well supposed that the usage is to be considered as equivalent to the direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only—for, then, the check would be altered in a manner which would take it out of the exemption of the Stamp Act, 53 Geo. 3. c. 104, sched. 1, which applies to checks payable to bearer only, and the bankers to whom it was addressed could not be bound to pay to the person named. We are, therefore, of opinion that the crossing the check with the name of a banker could not have the effect of restricting its negotiability to such banker only. To hold it to have this effect would be to render the instrument no longer a check. The case of *Sigourney v. Lloyd* was cited on both sides; but it really has no application. The point there decided was one concerning a restrictive indorsement of a bill transferable by indorsement only, which is lawful. We think, therefore, the plaintiffs cannot succeed on the first count.

Bellamy v. Majoribanks.

The learned counsel for the plaintiffs, however, both at the trial and on the argument, relied with greater confidence upon the count for money lent, and they insisted that the payment to Messrs. Gosling's clerk of the check, double crossed in the manner in which it was, was an unauthorized and negligent act, and that the defendants had no right to credit themselves with this payment, and if this contention were well founded, the defendants would certainly be without defence, as the only answer to this count was a plea of payment. It was also alleged that the addition of the crossing to the Bank of England, the words "for the account of the Accountant General," imposed a greater degree of responsibility upon the defendants. None of the witnesses, however, appeared to attach much importance to this circumstance as against the defendants, and many of them considered that it made in their favor, inasmuch as it was well known that the Bank of England would not receive for the Accountant General a check so crossed. The evidence on both sides was mainly directed to the circumstance of the double crossing. On behalf of the plaintiff, it was said, that the original crossing by Mr. Bellamy to the Bank of England ought to have prevented the defendants from paying the check to Messrs. Gosling, or, at all events, ought to have made the payment one at their peril in the event of Geary misapplying the money. On the behalf of the defendants, it was said, the payment was strictly according to the custom and usage of bankers in respect of crossed checks, and that the payment was a payment to Geary, the payee of the check. As the effect of crossing a check is not, in our opinion, to restrain the negotiability of the check, it will be fit to consider what it probably is, that the attention of the jury may be directed to that question on the new trial. It was agreed on all hands that the practice of crossing checks originated at the clearing-house; the clerks of the different bankers which do business there having been accustomed to write across the checks the names of their employers, so as to enable the clearing-house clerks to make up the account. It was quite clear that this had nothing whatever to do with the restriction of the negotiability, for at the time when this was done the checks were in the course of payment there on presentation for payment, and all their negotiability was at an end. The establishment of the clearing-house is comparatively modern and was within the memory of several of the witnesses. It afterwards became a common practice to cross checks which were not intended to go through the clearing-house at all with the name of a banker, or with the words "— and Co.," leaving the rest in blank; and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of a custom, and we think that the great preponderance of evidence on both sides tended to show the custom to be that which is reported to have been stated by some of the jury in the case of *Stewart v. Lee, Moo. & M. 158*; namely, that when a check is crossed, bankers generally refuse to pay it to any one except a banker, and if they do pay it to a person not a banker, they consider that they do it at their peril in the event of the party to whom the payment is made not be-

Bellamy v. Majoribanks.

ing entitled to receive it: that the object is to secure the payment not to any particular banker, but to a banker, in order that it may be easily traced for whose use the money was received; and that it was not intended thereby at all to restrict the circulation or negotiability of the check, but merely to compel the holder to present it through a quarter of known respectability and credit. We are strongly inclined to think, on a full inquiry, the usage will turn out to be no more than this: and considering the custom in this point of view the crossing is a mere memorandum on the face of the check, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such a usage is highly beneficial to the public. These instruments are in their essential character payable to bearer; they are in many respects treated as bank notes, for which of late years they have been largely substituted; but like all other things they are liable to be mislaid, or lost, or stolen, and may get into the hands of persons who are not entitled to receive payment of them. It is manifestly therefore a great protection and safeguard to the real owner that there should exist the means of tracing and ascertaining for whose use the money paid on the check was received, and to whom the money actually goes, and the payment through the bankers secures this object. Bankers are in general persons of great respectability, and, we believe it may be truly said universally, are incapable of lending themselves to any concealment or suppression of the truth in order to promote or assist fraud. We think, therefore, it is matter of great public advantage and benefit that the custom or usage which we have already mentioned has been said to exist in point of fact, should be maintained, and we think it may well be, without at all improperly trenching upon or restricting the negotiability of checks. We think the crossing of a check is a protection and safeguard to the owner of the check, and in the event of a banker paying a crossed check otherwise than through a banker, the circumstance of his paying it would be strong evidence of negligence in an action against him. For instance, let us suppose a customer of a banker to draw and cross a check, intending to pay it to a person to whom he was indebted, and that afterwards and before handing it over to his creditor he either lost it or it was stolen from him; if the check was presented otherwise than through a banker, then according to the custom or usage above mentioned it would not be paid, but if presented by a banker it would. The mere circumstance of the necessity of placing the check in the hands of a banker would of itself oppose some impediment to the fraudulent holder in dealing with the check and making it available, and it could be at once traced and ascertained for whose use the proceeds were received, and would give considerable aid in enabling the drawer to recover back the money in the event of his being entitled to do so. On the other hand, if the banker disregarded the custom and paid that check to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge his customer with the payment if the person actually presenting it was not the lawful holder and bearer of the check. The lawful holder of the check is of necessity entitled

to receive payment of it. He could not sue the drawee unless the drawee had accepted the check, a practice not usual; but he could sue the drawer for non-payment if he was the holder for value. No prudent banker would, however, pay a crossed check otherwise than to a banker, except he was fully satisfied as to the title of the party presenting it to receive payment; if he did, he would run the risk of the bearer of the check having no title to it. We think there is no legal objection to the custom thus limited and understood upon the ground of its being repugnant to the essential quality of the check, namely, its negotiability by the drawer. There is no obligation upon any one to receive payment by a check, whether it be crossed or not crossed; but if a man receives a crossed check, he seems to us not indeed to incur the obligation of presenting it for payment through a banker as a condition precedent, but he ought not to complain if the drawee does not pay without previous inquiry. There is really no restriction upon its negotiability, but it is in our opinion a reasonable and lawful practice and usage, in order to secure as far as possible the payment of the check to the honest and *bonâ fide* holder. It was contended by the learned counsel for the plaintiffs in argument before us, that upon the plea of payment the onus was upon the defendants to show that the payment was duly and properly made, and in that we agree. But we think it is highly probable the custom or usage before mentioned was that which was established by the preponderance of the evidence at the trial, and that in such a case the circumstance of the check in question being doubly crossed appears to be immaterial: the custom would authorize the payment to any banker, and the payment to Messrs. Gosling would not be the less regular because the check was a second time crossed in their name. We are, therefore, of opinion that the verdict as to the question of negligence was also against the weight of evidence, and that the defendants are, on that account, entitled to a new trial.

Another point was argued for the plaintiffs, that the crossing of the check was not by the holder but by the drawer himself, who had the power to give any directions he pleased to the bankers; that it was equivalent to an addition to the check, which was originally payable to bearer, of an express direction that it should not be paid to bearer, but to the Bank of England only. He admitted that in such a supposed case the defendants were not bound to pay the Bank of England, because the alteration would bring the check within the operation of the stamp laws; but he contended that if the defendants chose to pay it, they could not do so to any one else, and if they did, they would disobey the order of their customer, and could not charge the amount to his debit in account. This reasoning would be correct if the crossing, when made by the drawer, by custom amounted to a direction to pay the named banker only, and for the named account. If such were its conventional meaning, it would be necessary for bankers not merely to look to the signature of the check, but also to the handwriting of the crossing. But the crossing itself does not import that payment is to be made to the Bank of England only. It is matter of evidence what its meaning is by the

Asplin v. Blackman.

usage. On the trial the evidence has not made any distinction between the meaning of the words when written by the customer of a banker and by a third person; and we have before intimated our opinion that according to the weight of evidence they have not the restrictive meaning attributed to them by the plaintiff's counsel. It seems to us probable the more correct view of the practice of crossing is for the protection of the holder of the check. As we have before said, we feel strongly that to carry it further, or to make the banker answerable to his customer for the appropriation by the payee of the proceeds of a crossed check when received through a banker, would render the conducting of banking business very difficult, if not impracticable, and would cast a very serious and probably mischievous impediment to carrying on the money transactions of the country.

Rule absolute, on payment of costs.

ASPLIN v. BLACKMAN.¹

February 13, 1852.

County Court — Concurrent Jurisdiction, &c. — Discretion of Judge — Order for Costs — 9 & 10 Vict. c. 95, s. 12 — 13 & 14 Vict. c. 61, s. 13.

In all cases where the superior courts have a concurrent jurisdiction with the county courts, under the 128th section of the 9 & 10 Vict. c. 95, or where no plaint could have been entered in any county court, or where the cause is removed from the county court by *certiorari*, the court or a judge is bound, by the 13 & 14 Vict. c. 61, s. 13, on being satisfied that the case falls within the 128th section, to make an order that the plaintiff who has recovered less than 20*l.* in a superior court shall recover his costs.

A SUMMONS had been taken out before Alderson, B., calling on the defendant to show cause why the plaintiff should not recover his costs in the above action.

The motion was made on affidavits, which showed that the action had been brought in the Court of Exchequer for work done to a phaeton and break belonging to the defendant. The defendant paid 11*l.* 10*s.* into court.

The jury found a verdict for the plaintiff, damages 2*l.* 10*s.* The defendant resided within the jurisdiction of one of the metropolitan county courts; but the cause of action did not arise either wholly or in some material point within the jurisdiction of the county court, within which the defendant dwelt or carried on his business at the time of action brought.

The cause was tried on the 15th of November last, and at the conclusion of the trial the learned judge directed the plaintiff to be held to bail to answer a charge of perjury. An order was afterwards

¹ 21 Law J. Rep. (N. S.) Exch. 78.

Asplin v. Blackman.

made to change the plaintiff's attorney, which was accordingly done.

The plaintiff was subsequently tried, at the Central Criminal Court, for perjury, and acquitted. The present summons was taken out on the 7th of February, previously to the decision of the Court of Queen's Bench in *Crake v. Powell*,¹ which was given on the 10th of February. The case came on, before Alderson, B., at chambers, on the 10th of February, when upon a statement that the Court of Queen's Bench had that morning decided a similar case of *Crake v. Powell* in conformity with the decision of the Court of Common Pleas in *Macdougall v. Paterson*, 2 L. M. & P. 681; s. c. 7 Eng. Rep. 510, and in opposition to the case of *Jones v. Harrison*, 6 Exch. Rep. 328; s. c. 3 Eng. Rep. 579, in the Court of Exchequer, and *Palmer v. Richards*, 6 Exch. Rep. 335; s. c. 5 Eng. Rep. 535, his lordship adjourned the case to the 13th of February at Westminster. On the 13th of February the case came on in the judges' room at Westminster, before Alderson, B., Parke, B., being also present.

Horn, in support of the summons, was stopped.

[ALDERSON, B. I shall abide by the decision of the Court of Queen's Bench.]

Prentice, for the defendant. In this case there has been an unnecessary delay on the part of the plaintiff. He might have come to this court in Michaelmas or Hilary term last. The Court of Common Pleas have laid down a rule, that all applications like the present must be made promptly. *Orchard v. Mozey*² is in point.

Horn. The fact of the plaintiff having been indicted for perjury, together with the delay and expense consequent upon the change of attorneys, sufficiently account for the plaintiff not applying to this court at an earlier period. Besides, the plaintiff could not suppose that the Court of Exchequer would rescind its decision in *Jones v.*

¹ Not yet reported.

² In that case a rule nisi was granted on the 13th of January for the taxation of the plaintiff's costs in an action of trespass to recover damages for an assault and false imprisonment, and on the trial of which, in May last, before Lord Campbell, C. J., a verdict was found for the plaintiff with 40s. damages. It appeared that on the 26th of May the plaintiff applied to Patteson, J., at chambers, for the costs, under the 13 & 14 Vict. c. 61, s. 13, but the summons was dismissed on the authority of *Jones v. Harrison*, 6 Exch. Rep. 328; s. c. 3 Eng. Rep. 579. The defendant then paid the amount of the damages without prejudice to the plaintiff's right to apply to the court for his costs, but upon the Court of Common Pleas disapproving of the decision of *Jones v. Harrison*, in *Macdougall v. Paterson*, 7 Eng. Rep. 510, the present rule had been obtained, against which Sir F. Thesiger showed cause, on the ground that the plaintiff had been guilty of laches in not applying within a reasonable time. *Paterson* appeared in support of the rule. The Court said, that as the plaintiff had not applied within a reasonable time, but had lain by from May to December, when the decision of the Court of Common Pleas was pronounced, the rule must be discharged.

Faviell v. Gaskoin.

Harrison, in deference to the opinion of the Court of Common Pleas. In the case of *Orchard v. Mozey*, there was a delay of eight months.

[ALDERSON, B. The decision of the Queen's Bench in *Crake v. Powell* was not given until after Hilary term; and the plaintiff could hardly be expected to come to the Court of Exchequer, and ask them to reverse the decision of *Jones v. Harrison*. I think, under all the circumstances, the plaintiff has made his application within a reasonable time.]

In *Orchard v. Mozey*, Patteson, J., considered the delay of eight months to be unreasonable.

ALDERSON, B. I see no reason to change my opinion. I am bound to make the order for costs.

PARKE, B. I quite concur in the view taken by my Brother Alderson.
Order made.

A summons to stay proceedings upon the above order was afterwards taken out before Platt, B., for the purpose of enabling the defendant to take the opinion of the Court of Exchequer as to the correctness of the decision of Alderson, B.; but that learned judge, after time taken to consider and after consulting other judges, refused to make an order.¹

FAVIELL v. GASKOIN and others, executors of W. CLODE.¹

January 15, 1852.

Landlord and Tenant—Out-going Tenant—Custom of Country—Special Agreement.

A testator, being the owner of B. house and land and of two cottages, and the lessee of Little B. farm from Miss M., and of certain crown lands, for a term of fourteen years expiring at Michaelmas, 1849, and being desirous of selling B. house and land, entered into a negotiation with the plaintiff for the sale thereof, and let to the plaintiff for one year B. house and land, from the 29th of September, 1848, by an agreement, in which the testator agreed that if he should be able to obtain a further lease from the crown for fourteen years he would grant the plaintiff the same for thirteen years. By a subsequent agreement, the plaintiff, after stating that he was desirous of securing the occupation of Little B. farm and lands, adjoining the B. house and lands, and held by the testator of Miss M. and of the crown, agreed to take the said lands belonging to Miss M. and the crown, as under-tenant to the testator, "subject to the same rents, covenants, and obliga-

¹ It would seem, therefore, that the Court of Exchequer will abide by the decision of the Court of Common Pleas in *Macdougall v. Paterson*, and of the Court of Queen's Bench in *Crake v. Powell*; and that *Jones v. Harrison* and *Palmer v. Richards*, may be considered as overruled.

² 21 Law J. Rep. (N. S.) Exch. 85.

Faviell v. Gaskoin.

tions in all respects as provided for in the leases by which Mr. C. (the testator) holds or shall hold the same." By the terms of the crown lease the custom of the country, which was, that the landlord should pay to the out-going tenant for fallows, half fallows, &c., was excluded. The plaintiff, on entering upon the crown lands, paid the testator for fallows, half fallows, &c. The crown lease, at the request of the plaintiff, not having been renewed by the testator, but having expired by effluxion of time at Michaelmas, 1849:—

Held, that the plaintiff, as out-going tenant, was entitled to be paid by the executors for fallows, half fallows, &c., the custom of the country to that effect not having been excluded by the agreements between the parties.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff would become tenant to one W. Clode, since deceased, of a farm called the Crown lands, and would, as in-coming tenant, pay to W. Clode, according to the custom of the country, the amount of the usual valuation paid by an in-coming tenant for fallows, half fallows, dressings, &c.; each party to appoint a valuer; the said W. Clode promised the plaintiff that he would, at the expiration of the term, pay to the plaintiff, as out-going tenant, according to the custom of the country, the amount of such valuation for fallows, half fallows, dressings, &c. Breach, the non-appointment of a valuer by W. Clode in his lifetime, and by the defendants as his executors; and that they discharged the plaintiff from proceeding with the valuation, &c.

There were also the common counts.

The defendants pleaded non assumpsit, together with pleas denying the tenancy and the continuance thereof upon the terms stated in the declaration, and that the plaintiff discharged W. Clode from his promise.

At the trial, before Jervis, C. J., at the last Croyden Summer Assizes, the facts were these:— The action was brought by the plaintiff as the out-going tenant of certain land to recover from the defendants, as the executors of his landlord, W. Clode, the sum of 287*l.* for fallows, half fallows, dressings, &c., under these circumstances. W. Clode, the owner of an estate near Winsor, called the Bakeham House estate, which consisted of four separate holdings: first, of the dwelling-house and lands adjoining called Bakeham House, which formed the chief portion of the estate; secondly, of Little Bakeham farm, held by him under a lease from Miss Mackason; thirdly, of two cottages and land of copyhold tenure; and, fourthly, of certain crown lands held by him under a lease from the Commissioners of Woods and Forests, dated the 5th of March, 1841, for a term of fourteen years from the 10th of October, 1835, at a rent of 92*l.* William Clode, being desirous of selling the Bakeham house and land, and the plaintiff of purchasing it, it was arranged that the plaintiff should become the tenant of the property, with the option of afterwards becoming the purchaser, and accordingly, the following memoranda and agreements were prepared and signed by the parties and their agents.

By articles of agreement, dated the 23d of December, 1848, W. Clode agreed to let to the plaintiff certain pieces of land called Bakeham Farm, for one year from the 29th of September last. This agreement contained a stipulation that the plaintiff agreed to abide by, perform, and keep all and singular the covenants and agreements

Faviell v. Gaskoin.

contained in a certain indenture of lease, dated the 5th of March, 1841, and made between the Commissioners of Woods and Forests, and W. Clode, "whereby the said premises were demised to the said W. Clode, his executors, &c., for a certain term of years, which will expire on the 10th day of October next." W. Clode then agreed that in case he should be able to obtain a further lease from the crown of the said premises for fourteen years, he would grant to the plaintiff a lease of the same for thirteen years at rents payable quarterly, "and subject to covenants, clauses, provisos, conditions, and agreements similar in all respects to those which may respectively be reserved and contained in the new lease, which may so as aforesaid be obtained by the said William Clode from the crown." By the terms of the crown lease the custom of the country as between landlord and out-going tenant was excluded.

By a memorandum, dated the 29th of December, 1848, the plaintiff agreed to take as tenant the Bakeham estate, consisting of the dwelling-house, offices, farm buildings, twelve cottages, two of which were stated to be the separate property of W. Clode, and about 177 acres of land, and a lease of the same was to be granted for fourteen years, determinable on certain terms, the plaintiff having the option of purchasing the estate. The plaintiff agreed to pay for fallows, half fallows, dressings, &c., on the farm at a fair valuation, each party appointing his own valuer.

The memorandum of the 2d of February, 1849, signed by the plaintiff, was as follows:—"Being desirous of securing the occupation of the farm and lands adjoining the Bakeham estate, Egham, which I have lately taken of Mr. Clode, belonging to the crown and to Miss Mackason, but held by Mr. Clode by leases about to be renewed, I hereby agree and engage to take the said farm and lands belonging to the crown and Miss Mackason, as under-tenant to Mr. Clode, *subject to the same rents, covenants, and obligations in all respects as are contained and provided for in the leases by which Mr. Clode holds or shall hold the same*, excepting that the term is to be determinable at the same time as my lease of the Bakeham estate. Witness my hand, W. F. Faviell."

A memorandum of the 7th of February stated that the plaintiff took to the Bakeham estate, and to the crown and Miss Mackason's lands as from last Michaelmas, from which quarter-day the leases were to commence. There was then another memorandum, also dated the 7th of February, 1849, which contained, amongst other things, the following stipulation: "And in consideration of this allowance of 200*l.*, and of the said William Clode engaging to grant leases of certain contiguous lands as held by him of the crown and of Miss Mackason, when renewed, together about 112 acres, little more or less, without any bonus or increased rent (but determinable at the same period as the Bakeham lease,) the said William Frederick Faviell agrees to take to the said contiguous lands, with the buildings thereon in their present state, without any further allowance for any repairs that are or may be hereafter required to or for the said buildings."

Faviell v. Gaskoin.

On the 12th of January, 1849, the plaintiff wrote to one of the defendants in these terms:—"I hope Mr. Clode has by this time renewed the lease of the crown land and Miss Mackason's; because, if that is not done, I cannot be expected to pay the valuation for dressings, &c., which I shall never have the benefit of. The lease of the crown land might be seven or fourteen years, I do not care much which it is. Yours, &c., W. F. Faviell."

In February, 1849, a valuation, according to the custom of the country, was made in respect of all the land taken by the plaintiff, the amount of which being 2233*l.* 19*s.* was afterwards paid by the plaintiff. That portion of the valuation which related to the crown lands amounted to about 240*l.* The plaintiff took possession of the premises in February, 1849, and in May following signified his determination not to renew the crown lease, and requested the defendant, J. Clode, not to renew. The crown lease was accordingly not renewed. The plaintiff gave up possession of the premises at Michaelmas, 1849, and claimed to be paid by the testator for fallows, half fallows, &c., according to the custom of the country.

The learned judge left it to the jury to say, whether the custom for the landlord to pay the out-going tenant was proved, and the jury having found in the affirmative he directed a verdict for the plaintiff, with leave to the defendants to enter a verdict for them if the court should be of opinion on the construction of the documents, that the custom of the country was excluded by the agreement between the parties.

Channell, Serjt., having obtained a rule *nisi* accordingly, and also on the ground of the verdict being against the evidence,

Bramwell, (*Raymond* with him,) for the plaintiff, showed cause. The plaintiff, as in-coming tenant, having paid the testator, his landlord, for the fallows and dressings of the crown lands, was entitled to receive payment as out-going tenant, according to the custom of the country, in respect of the sums he had expended upon the same land. The lease expired, by effluxion of time, on the 29th of September, 1849. On the part of the defendant, it will be contended, that the agreement between the parties excluded the custom of the country, but that is not the case. The plaintiff, on entering the land, paid the testator for the fallows, dressings, &c., and is entitled to be paid in like manner on quitting. (He was then stopped by the court.)

Channell, Serjt., and *Bovill*, in support of the rule. The object of the plaintiff was, to obtain one and the same interest in all the lands demised, as the testator W. Clode had, and this was the consideration for his paying for the fallows and dressings on his taking possession. His letter of the 12th of January, 1849, is most important; he there says, "I hope Mr. Clode has, by this time, renewed the lease of the crown land and Miss Mackason's, because if that is not done I cannot be expected to pay the valuation for dressings, &c., which I shall never have the benefit of." The plaintiff took the crown land as tenant

Faviell v. Gaskoin.

from year to year, subject to the same terms as those under which his landlord held. The plaintiff agreed "to abide by, perform, and keep all and singular the covenants and agreements contained" in the crown lease.

[PARKE, B. That is, he was to indemnify the testator against all covenants that that party had entered into with the crown.]

The testator had no claim against the crown for fallows and dressings; it was not intended that his tenant should be in a better situation than if he had had a renewal.

[PARKE, B. The testator received money from the plaintiff as in-coming tenant, and is bound to pay him as out-going tenant.]

The plaintiff stipulated by the memorandum of the 9th of February that he was to hold the crown lands without any bonus or increased rent. The transaction amounted to a purchase from the testator of a right to get a crown lease. The result of all the documents is, that the plaintiff was not to be paid on quitting the land, according to the custom of the country. The agreement excluded the custom.

PARKE, B. (POLLOCK, C. B., was absent.) I think this rule must be discharged. The question is, whether the custom of the country has been excluded by the agreements between the parties in this case. We must look to the agreements to see whether they exclude the custom of the country, that the tenant is to be repaid at the end of the term. Now, in all these agreements there is nothing which is inconsistent with the right of the tenant to repayment; and the only foundation for the argument on the part of the defendants depends upon that portion of the agreement in which the plaintiff agrees to "abide, perform, and keep all and singular the covenants and agreements contained in a certain indenture of lease," &c. The meaning of that clause, however, is, that the plaintiff will keep up the same covenants as W. Clode was bound to do. The terms, however, of quitting are not the same. The plaintiff, during the continuance of the crown lease, was bound to perform all the terms of it. The custom of the country is not excluded.

Then, with respect to the intention of the plaintiff in taking the four properties, there is no foundation for the argument that the desire to become the occupier of them all was the consideration for the plaintiff's foregoing his right to be paid as out-going tenant. We must look at the obligations incurred by the plaintiff when he took this property, and then we shall find that the transaction between the parties amounted to nothing but a demise from year to year to which the custom of the country applies. The next question is, whether the landlord is liable to pay to the out-going tenant the expenses incurred by him; and I think that where there is no in-coming tenant, the landlord is, by the custom of the country, bound to pay the out-going tenant. I admit that the out-going tenant is in the habit of bringing actions against the in-coming tenant; but in this case there is a contract with the landlord to pay the in-coming tenant. By the custom of the country, where an in-coming tenant comes in, there is a contract implied that he will pay the out-going tenant, but, *prima facie*,

Nixon v. Phillips.

the contract is with the landlord. But if no in-coming tenant is substituted for the landlord, the latter is bound to pay; and in the present case he ought to have paid on the 28th of September, 1849. The other ground, as to the expiration of the landlord's interest, does not apply to this case, because here the lease expired by effluxion of time. If, indeed, it had ended before the 29th of September, 1849, a different question might arise, but that point does not arise now.

ALDERSON, B. I am of the same opinion. The agreement of the 23d of December stipulates that the plaintiff will save the testator harmless from all covenants entered into between the latter and the crown. But there is nothing in that agreement inconsistent with the existence of the custom of the country, as between the plaintiff and the testator.

MARTIN, B. I also think this rule ought to be discharged. The meaning of such a contract as this is, that the tenant having paid for the tillages on entering the farm, is to be paid back by the landlord at the expiration of the term. It is true, that in ninety cases out of a hundred the new tenant takes to the tillages, but still the landlord is liable to be sued for the value of them upon his contract. At the same time where a tenant has the benefit of the tillages, there may, under certain circumstances, be a ground for suing him in *indebitatus assumpsit*. The landlord is liable on his special contract; but the tenant may be liable, by reason of his having had the benefit of the tillages from the out-going tenant. As to the other point in the case, I think the agreement between the parties did not exclude the custom of the country. The jury have found the existence of the custom; what Mr. Clode's intentions were is not material; it may be that he would not have entered into this agreement if he had known the effect of it, but the jury have found that the custom of the country existed.

Rule discharged.

NIXON v. PHILLIPS.¹

January 23, 1852.

Usury — Bill of Exchange — 3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, s. 1.

A bill of exchange at three months, made to secure the repayment of money lent by the plaintiff at interest exceeding 5l. per cent., is not invalidated by reason of the plaintiff holding the security of land also for the repayment, within the 3 & 4 Will. 4, c. 98, s. 7, and the 2 & 3 Vict. c. 37, s. 1.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange for 116*l.*, payable three months after date.

¹ 21 Law J. Rep. (N. S.) Exch. 88.

Nixon v. Phillips.

Plea. That it was corruptly and against the form of the statutes, agreed that the plaintiff should lend to the defendant 106*l.*, and that the plaintiff should forbear and give day of payment thereof, and that the said bill of exchange was given to secure the repayment of 106*l.* so lent to the defendant, and also the sum of 10*l.*, being usurious interest thereon.

Replication. That the said bill of exchange was drawn and indorsed, and the said agreement made after the passing of the 3 & 4 Will. 4, c. 37.

Rejoinder. That the bill of exchange was made and indorsed, and the agreement made after the passing of the 2 & 3 Vict. c. 37, and that the agreement gave the plaintiff a security upon lands, namely, an equitable mortgage of land by means of the deposit of a lease by the defendant with the plaintiff. **Demurrer.**

J. S. Cross, for the plaintiff, in support of the demurrer. The rejoinder is bad, and the plaintiff is entitled to judgment. This bill of exchange is protected by the 3 & 4 Will. 4, c. 98, s. 7. That section enacts, that no bill of exchange or promissory note, payable at three months, shall, by reason of any interest taken thereon or secured thereby, or agreement to pay, receive or allow interest in discounting, &c., the same, be void. And the bill in question is not affected by the 2 & 3 Vict. c. 37, s. 1, which enacts that bills of exchange or notes payable within twelve months shall not, by reason of any interest taken thereon, be void, "provided, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." A bill of exchange like the present, payable at three months, although given to secure a contract relating to land, is protected. This case is governed by *Clack v. Sainsbury*, *ante*, p. 408. There the rejoinder resembled the present, except in omitting to state that the contract related to an interest in land. In that case, *Jervis, C. J.* said, "The 2 & 3 Vict. c. 37, applies to all bills having twelve months to run; and I think that it does not absorb and get rid of the statute of William. The two statutes are not inconsistent with each other. The legislature said, by the statute of Will. 4, that certain bills not having more than three months to run, should not be liable to any restrictions as to interest; and subsequently, by the statute of Victoria, the legislature applied this provision to all bills, and to all contracts having less than twelve months to run, but with another qualification, that there should be no collateral deposits of landed security."

[**PARKE, B.** Your argument is, that the validity of a bill of exchange at three months is not affected by reason of its being secured by land, but that a bill at more than twelve months secured on land is usurious.]

That is the argument.

[**PARKE, B.** If so, I think there has been an oversight on the part of the legislature, for it never could have been intended that more than 5*l.* per cent. should be taken on a mortgage of land. *Thibault v. Gibson*, 12 Mee. & W. 88; s. c. 13 Law J. Rep. (N. S.) Exch. 2,

Dixon v. Phillips.

shows that the 2 & 3 Vict. c. 37, does not repeal the 12 Anne, st. 2, c. 16, relating to usury, but merely takes out of its operation all contracts made usurious by that statute, except such as relate to land.]

Bovill, contra, for the defendant. The case of *Clack v. Sainsbury* gives rise to an inference that if landed security had been given in that case, and the fact had been rejoined, the judgment of the court would have been different. The rejoinder in this case is framed on the authority of that decision, and does state that the note was secured upon land. Here the question arises on the 3 & 4 Will. 4, c. 98, s. 7, and that section applies only where the transaction is on a bill alone, and not where it is connected with the security of land. Where there is something more than the bill itself, the transaction is not protected.

[PARKE, B., referred to *Doe d. Haughton v. King*, 11 Mee. & W. 333; s. c. 12 Law J. Rep. (N. S.) Exch. 320.]

Berrington v. Collis, 5 Bing. N. C. 332; s. c. 8 Law J. Rep. (N. S.) C. P. 175, is in point. There a loan of money at more than 5l. per cent. upon the security of a deposit of a lease, a warrant of attorney, and a promissory note, was held not protected by the 3 & 4 Will. 4, c. 98, s. 7.

[ALDERSON, B. The 3 & 4 Will. 4, c. 98, s. 7, repeals the usury laws as regards bills at three months.

PARKE, B. You must go to the length of contending that a bill of exchange which is secured by the deposit of hogsheads of sugar is void.]

The argument must go that length.

J. S. Cross, in reply. The case of *Connop v. Meaks*, 2 Ad. & E. 326; s. c. 4 Law J. Rep. (N. S.) K. B. 67, is in point. (He was then stopped by the court.)

POLLOCK, C. B. The plaintiff is entitled to the judgment of the court. The case is decided by *Clack v. Sainsbury*. I am by no means certain that the framers of the act of parliament did not mean that the act should be so construed, for without doubt the words of the act carry that meaning. There is a difference between the value of money, which is to be borrowed for three months, and that which is to be borrowed for twelve months. There is good reason why larger interest should be taken on a bill payable at three months, even although there may be the security of land added to it, than on a bill which has twelve months to run. Our construction of this act is supported by considerations of public policy.

PARKE, B. This case is decided by the authority of *Clack v. Sainsbury*, and I see no reason to quarrel with that decision. It may perhaps have been an oversight in the framers of the act of parliament to put on the same footing money secured by bill of exchange and money secured by land; but we must construe the act of parliament according to its plain and obvious meaning. The decision of the

Bridgman v. Dean.

Court of Common Pleas leans to the conclusion that any amount of interest secured on a bill of exchange, payable at three months, may be a valid transaction, although there may be in addition the security of landed property. The argument for the defendant goes to this length, that if goods were deposited by way of additional security for the payment of interest exceeding 5*l.* per cent., the whole transaction would be invalidated. That view imposes too narrow a construction on the statute, and cannot be supported.

ALDERSON, B. The defendant is in this predicament, that if his argument be correct, namely, that where a bill of exchange is mentioned as a security it means a bill of exchange only, it was unnecessary for the legislature to make any provision respecting the security of landed property. See *Follett v. Moore*, 4 Exch. Rep. 410; s. c. 19 Law J. Rep. (N. S.) Exch. 6.

Judgment for the plaintiff.

BRIDGMAN & another v. DEAN.¹

January 23, 1852.

Accord and Satisfaction — Assumpsit — Consideration — Plea of no signed Bill, Sufficiency of.

A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, namely, for so much as the plaintiffs deserved to have of the defendant for work done by the plaintiffs as attorneys for the defendant; that the plaintiffs alleged that the said debts amounted to 171*l.* 9*s.* 8*d.*, and the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue, and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim, and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, "one calendar month before the commencement of this suit, deliver to the defendant a signed bill":—

Held, first, that the plea was good; secondly, that the declaration was bad in not disclosing a sufficient consideration for the defendant's promise to pay the 150*l.*

ASSUMPSIT. The declaration stated that the defendant was justly and truly indebted to the plaintiffs in divers unliquidated debts and demands before then incurred and accrued to the plaintiffs against the defendant, that is to say, for so much money as the plaintiffs reasonably deserved to have from the defendant for work done by the plaintiff, as attorneys and solicitors, for the defendant; and the defendant being so indebted, it was alleged by the plaintiffs that the said debts and demands amounted to a sum exceeding 150*l.*, to wit, the sum of 171*l.* 9*s.* 8*d.*, which the defendant denied, and alleged that the said

¹ 21 Law J. Rep. (N. S.) Exch. 90.

Bridgman v. Dean.

debts and demands of the plaintiffs amounted to a less sum than that claimed by the plaintiffs, to wit, to the sum of 147*l.* and no more, and a difference and dispute having so then arisen and being pending between them, it was agreed between them that the said difference and dispute should be put an end to, and the amount of the debts and demands fixed at 150*l.* and no more; that the plaintiffs should relinquish their claim to the residue of the sum over and above the 150*l.*, and that the debts and demands should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.* Then followed a statement of mutual promises, and an averment that the plaintiffs put an end to the difference and dispute; that the debts and demands were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim or demand against the defendant than for the sum of 150*l.*, and that the said debts and demands were satisfied upon the terms in that behalf. Breach, non-payment, of 150*l.*

Fourth plea, that the plaintiffs did not, "one calendar month before the commencement of this suit deliver to the defendant" a signed bill, &c.

Special demurrer.

Maynard, for the plaintiffs, in support of the demurrer, was desired by the court to support the declaration. The declaration is good. It will be argued, on the other side, that the declaration is bad by reason of there being no consideration for the agreement. But this is not the case. The declaration has been framed with reference to the language of Lord Abinger, C. B., in *Edwards v. Bough*, 11 Mee. & W. 641; s. c. 12 Law J. Rep. (N. S.) Exch. 426. There the declaration stated that disputes and controversies had arisen between the plaintiff and the defendant as to whether or not the defendant was indebted to the plaintiff in 173*l.* 2*s.* 3*d.* for money lent to the defendant by the plaintiff, and thereupon in consideration that the plaintiff would then promise the defendant not to sue him at any time for the recovery of the said sum so in dispute, and would accept from the defendant the sum of 100*l.* in full satisfaction and discharge of the same, the defendant promised the plaintiff to pay the sum of 100*l.* within a reasonable time. It was held, that the declaration was bad as not showing a sufficient consideration for the promise, there being no allegation of any debt being due, but merely that a dispute and controversy existed respecting it. Lord Abinger, C. B., there said, "The case might have been different if the declaration had said 'whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent, and also on an account stated,' that a dispute arose as to the amount of the debt so due; and in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving 160*l.*, should not sue the defendant in respect of his original claim." Here the declaration states that the "defendant was justly and truly indebted to the plaintiffs in divers unliquidated debts and demands." *Smith v. Holmes*, 10 Jur. 862, and *Crowther v. Farrar*, 15 Q. B. Rep. 677; s. c. 20 Law J. Rep. (N. S.) Q. B. 298, are in favor of the plaintiffs. In those cases pro-

Bridgman v. Dean.

ceedings had been commenced for the recovery of the debts; but that circumstance can make no difference as regards the present case, because in the present case there exists a right to damages. The declaration in this case, which is framed upon the suggestion of Lord Abinger, C. B., in *Edwards v. Baugh*, states that there was no dispute as to the existence of debts to some amount. The opinion of Lord Abinger, C. B., is also confirmed by Patteson, J., in *Llewellyn v. Llewellyn*, 3 Dowl. & L. P. C. 318. The existence of cross-claims in that case cannot make any difference. *Evans v. Powis*, 1 Exch. Rep. 601, and *Cumber v. Wane*, 1 Str. 426; s. c. Smith's Lead. Cas. 150, are in point. This is the case of the *novatio necessaria et voluntaria* of the Roman law. *Cooper v. Phillips*, 1 Cr. M. & R. 649, applies. The cases of *Scadding v. Eyles*, 9 Q. B. Rep. 858; s. c. 15 Law J. Rep. (N. S.) Q. B. 364, and *Brooks v. Bockett*, 9 Q. B. Rep. 847; s. c. 16 Law J. Rep. (N. S.) Q. B. 178, are also in point.

[PARKE, B. This is merely settling an unliquidated claim by a liquidated claim.

• POLLOCK, C. B. In the present case there is nothing but a promise; it is not the case of a promissory note or bill of exchange.

PARKE, B. In *Llewellyn v. Llewellyn*, there was a cross-claim which formed a good consideration; here there is merely the liquidation of an unsettled account. There is no averment of a cross-demand.

POLLOCK, C. B. You are attempting to carry the doctrine further than it has been carried in any other case.]

Secondly, the plea is bad. It does not state in sufficiently clear terms that which is required by the statute respecting a signed bill. It may be true that a signed bill had been delivered a month before action, although a clear calendar month might not have elapsed after the delivery of the bill. The plea ought to have stated that the action was commenced before the expiration of a month after the delivery of the bill. The present averment is not a material one, and if traversed and found for the plaintiffs would not be conclusive. *Blunt v. Haslop*, 9 Dowl. P. C. 982, and *Parker v. Gill*, 5 Dowl. & L. P. C. 21, are in point.

Willes, contra. The declaration is bad. It is the case of an accord executory.

[PARKE, B. It is nothing more than a special account stated.]

Hopkins v. Logan, 5 Mee. & W. 241; s. c. 8 Law J. Rep. (N. S.) Exch. 218, *Flockton v. Hall*, 19 Law J. Rep. (N. S.) Q. B. 1, and *Henderson v. Stobart*, 5 Exch. Rep. 99; s. c. 19 Law J. Rep. (N. S.) Exch. 135, are in point. Secondly, the plea is good: it is in the ordinary form. *Parker v. Gill* is not in point. It merely decides that in a plea the word "month" means calendar month. (He was then stopped by the court.)

POLLOCK, C. B. The point has been so much discussed, that it is enough to say that for the reasons stated by the court during the argument, the defendant is entitled to judgment.

In re Harris.

PARKE, B. The declaration at best alleges nothing more than an account stated.

ALDERSON, B., and MARTIN, B., concurred.

Judgment for the defendant.

*In re HARRIS.*¹

February 6, 1852.

Legacy — Liability of Executor to account — Trust for Children.

- * A testator made his will in these terms: — "I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children," naming them, and making her sole executrix: —

Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account.

THIS was a rule calling upon John Richmond and Eliza his wife, (formerly the wife of John Harris and now his executrix,) to show cause why they should not deliver an account of the legacies, and of the property of John Harris.

The will of John Harris, a baker, at Cambridge, was in these terms: — "I give and bequeath all my property, of whatsoever description, to my wife, Eliza Harris, for the maintenance of herself and our children, Ellen Harris, Emma Harris, James Harris, John Harris, Josiah Harris, Edwin Percival Harris, and Charles Walton Harris, and I constitute my said wife to be sole executrix of this my will," &c. Applications for an account on the part of the office of Inland Revenue were resisted on the part of the executrix, who stated by letter, through her attorney, that the will did not contain a trust for the children, and that the share of each child did not amount to 20l.

Worlledge, for the executrix, showed cause. The executrix is not bound to deliver an account; first, because she takes under the will all the interest in the property; secondly, because if she does not, the interest of the children is so small and so unascertainable that no legacy duty attaches. First, the whole legal interest is given to the wife, and as executrix she has the whole legal control over it. The interest that her children have is merely an equitable one. In *Bowden v. Laing*, 14 Sim. 113, the testator directed his residue to be converted into money, and his wife to receive the interest of it for the maintenance of herself and children. There the Vice-Chancellor said, "When the income of property is given, as it is in this case, to the mother, for the maintenance of herself and her children, what is intended is that she shall receive the whole of the income, and shall maintain the children out of it as long as they form part of her family. But when they are *foris-familiated* they lose the right to

¹ 21 Law J. Rep. (N. S.) Exch. 92.

In re Harris.

the maintenance." *In re Wilkinson*, 1 Cr. M. & R. 142; s. c. 3 Law J. Rep. (n. s.) Exch. 236, is in point. There the widow was required by the testator to maintain the children after his death in the same manner as before. The present is an intermediate case. In *Thorpe v. Owen*, 2 Hare, 607; s. c. 12 Law J. Rep. (n. s.) Chanc. 417, the devise was to the wife that she might support herself and her children according to her discretion and it was held that she took an absolute interest for her life in the real and personal estate. That case exactly resembles the present. *Crockett v. Crockett*, 2 Ph. 553; s. c. 17 Law J. Rep. (n. s.) Chanc. 230, may be relied on by the other side, but does not assist the crown, as there the words conveyed a larger interest than the present words. *Woods v. Woods*, 1 Myl. & Cr. 401, was referred to in that case. There the testator gave the overplus to his wife towards her support and her family. In *Pope v. Pope*, 10 Sim. 1, it was held, that there was no trust. *Longmore v. Elcum*, 2 You. & C. C. C. 363; s. c. 12 Law J. Rep. (n. s.) Chanc. 469, is also in point. Secondly, this is no interest which is capable of being ascertained within the meaning of the Legacy Act, 36 Geo. 3, c. 52, ss. 7, and 11. It is not the case of a sum of money to be expended for the advancement and education of the children, but is for their maintenance only. If the executrix is to render an account it would be necessary for her to ascertain the daily consumption of food by each child, the quantity of clothes worn, and perhaps the amount of medicine administered to each. The executrix expends money upon her children *de die in diem*, and the benefit varies every hour. Besides, the benefit in the whole to each child is less than 20*l*.

Sir W. Paige Wood (Solicitor-General), for the crown. The only question in this case is, whether the executrix is not bound to render an account. She refuses to show that the interest taken by her children is less than 20*l*. The case is, therefore, the same as if she had 10,000*l*. a-year bequeathed to her, and it may be taken for the purpose of this argument that she has expended large sums upon her children: for instance, 100*l*. in sending one child to school, and 200*l*. in maintaining another at the university. She is bound in this case to render the best account she is able. This is a trust for the benefit of the children, for every gift to a wife for the maintenance of herself and children gives an interest to the children. *Longmore v. Elcum* is in favor of the crown. There is no difference between *Woods v. Woods* and the present case. There it was held that the children had an interest in the devised estates.

[PARKE, B. Is this a trust in favor of the children? If it is only a motive for giving the wife the money there is no trust, and the executrix is not bound to account.]

Crockett v. Crockett is in point.

[PARKE, B. If this is the case of a trust for the benefit of the children, the court is unable to say what amount is due to the crown, and the executrix ought to account. She can succeed only by showing that this is not a trust. We must decide that point. In *Thorpe v. Owen*, the testator desired that every thing during the life of the wife

Brettle v. Dawes.

should remain as it was, for her use and benefit, adding, that he gave the above devise to her that she might support herself and her children according to her discretion, and for that purpose; and it was held that the widow took an absolute interest in the property for her life. But the present case is very different from that.]

This is a trust in favor of the children, and the executrix is bound to furnish an account. (He was then stopped by the court.)

PARKE, B. The cases cited on behalf of the executrix are distinguishable. *Thorpe v. Owen* was the case of a gift to the wife, the motive being that she should support the children. Here the case is different. The executrix must account, and consequently the usual order must be made.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

BRETTE V. DAWES.¹

January 27, 1852.

Company—Winding-up Act, 11 & 12 Vict. c. 45—Interim Manager—Staying Proceedings in Action against Company.

An interim manager appointed under the Winding-up Act (11 & 12 Vict. c. 45, s. 20,) is not an official manager within the 73d section; and, therefore, the court will not, under that section, stay proceedings in an action against the company ordered to be wound up, or other person representing the company, unless an official manager has been appointed.

THIS was a rule calling upon the plaintiff to show cause why the proceedings in this action should not be stayed until after the proof or exhibiting or making such proof as the plaintiff might be able, of his debt or demand, before the Master in Chancery, to whom the winding up of the affairs of *The Pennant and Craigven Consolidated Lead Mining Company* had been referred, pursuant to the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45.

It appeared on the affidavits that the company was formed in 1848, and this action was commenced in June, 1851, against the defendant in respect of a claim for which the company was liable. Notice of trial was given for the 13th of November last, but just before the trial the defendant consented to a Judge's order for payment of the amount on the 15th of December. In default of payment the plaintiff signed judgment on the 16th, and issued execution, and on the 17th, the sheriff seized. Meanwhile, on the 15th, an order had been obtained under the Winding-up Act, and an interim manager appointed. A summons was taken out to set aside the judgment, which was dismissed; and another summons to stay the proceedings was then

¹ 21 Law J. Rep. (N. S.) Exch. 94.

Brettell v. Dawes.

taken out, being returnable on the 18th. No order was, however, made, but further proceedings were stayed (the amount of the levy being paid into court) that the present rule might be applied for; and against this rule —

Robinson now showed cause. The rule ought to be discharged, because the application was made against good faith. The defendant gained time by giving the Judge's order, or otherwise judgment might have been obtained on the 18th of November; and it was, therefore, a personal undertaking to pay, and not within the scope of the act — *In re Sudlow*, 19 Law J. Rep. (N. S.) Chanc. 524. Another objection is, that the plaintiff has nothing more to do; the judgment having been signed no proof of debt can be necessary. But it is also contended that this case does not fall within the statute at all, because there was no official manager appointed, and the interim manager fills a different capacity altogether. His duties are defined by section 20¹. The 58th section provides that, except where the contrary is "expressly

¹ Sect. 20 enacts, "That in the mean time, and until an official manager shall be appointed, as hereinafter mentioned, and from time to time, when there shall be no official manager, it shall be lawful for the master, in any case in which he shall deem it necessary or expedient so to do, immediately upon the order absolute being brought in before him, to appoint by writing under his hand some person to be the interim or provisional manager of the property, assets, and effects of the company to which such order absolute shall relate, or of such part or parts thereof as the master shall think fit; and the person to be so appointed shall thereupon have and exercise all such and the like powers and authorities as are usually given to and are had and exercised by receivers appointed by the court in a suit duly instituted, together with all such powers and authorities as might be had and exercised by any official manager to be appointed under this act, except so far as the master shall otherwise direct in any particular case; and the person so to be appointed interim or provisional manager shall act in all things under the direction of the master, in collecting and receiving and afterwards disposing of the property, estate, and effects of such company, or such parts thereof as in order to the preservation and security thereof shall require to be so collected and received; and it shall be lawful for such interim or provisional manager, acting in that behalf under the direction of the master, to be signified by writing under his hand, to pay and apply any part of the moneys, assets, and effects to be collected, received, or got in by him in or towards the discharge or satisfaction of any judgment debt which shall have been recovered against such company; and it shall be lawful for the master to fix the amount and nature of the security to be given and entered into by such interim or provisional manager, and also (if the master shall think fit) to appoint any person to be interim or provisional manager without giving or entering into any security, and the security, if any, to be so fixed by the master, shall accordingly be given and entered into by such interim or provisional manager: Provided, nevertheless, that upon the appointment of an official manager of such company, under this act all the powers and authorities of such interim or provisional manager shall cease, and the person who shall have been such interim or provisional manager shall thereupon deliver up and pay up to the official manager all the goods, moneys, property, and effects of such company which shall have come to his hands as such interim or provisional manager as aforesaid, together with all books, papers, and writings in his possession, custody, or power relating thereto, or to the affairs of such company; and it shall be lawful for the master to make an order, if need be, directing such delivery and payment accordingly, and for vacating any recognizance entered into by such interim or provisional manager and his surety or sureties (if any): Provided also, that no action, suit, or other proceeding shall be instituted or prosecuted by or against any interim or provisional manager to be appointed as herein mentioned, as representing the company, otherwise than by the style and designation of the official manager of the company; and that every such action, suit, or

provided," the rights of creditors are not to be affected by the statute. *Prescott v. Hadow*, 5 Exch. Rep. 726 ; s. c. 1 Eng. Rep. 487. An interim manager has no power to take the proof of debts. Some days must elapse before an official manager can be appointed, as the contributories have a right to be heard; but an interim manager is appointed by the master alone. The 7th section of 12 & 13 Vict. c. 108, shows that the "official manager" does not mean interim manager, for it expressly enacts that certain provisions of the first act, as to the official manager, shall extend to any provisional or interim manager. He referred also to *Macgregor v. Keily*, 4 Exch. Rep. 801 ; s. c. 19 Law J. Rep. (N. S.) Exch. 126.

Bramwell, in support of the rule. The object of the 73d section is not so much to obtain proof of the debts, but that the master may know what provision he is to make to meet the several liabilities.

[ALDERSON, B. But the proof is as to the liabilities of the company, which the official manager is to determine, while the interim manager has no such duty.]

Debts may be proved in respect of which the whole company is not liable, and the call may be made on one or more individuals. It was not intended that there should be two different sorts of managers, but only different managers at different times. The 72d section,

other proceeding shall be instituted and prosecuted in the same manner and with the same effect, to all intents and purposes, as if an official manager of the company had been already appointed, and were a party to such action, suit, or other proceeding, in the place of such interim or provisional manager, nor shall the same abate by reason of the appointment of an official manager, but the same shall be carried on by or against him, as the case may be."

Sect. 58. "That except as is by this act expressly provided, nothing in this act contained, nor any petition or order under the same for the dissolution and winding up, or for the winding up of any company, shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, or other persons not being contributories of the company, or the rights or remedies of creditors, being also contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories of the same, nor the rights or remedies of the company against any contributories or other persons, nor shall alter or affect any contracts or engagements entered into by or with the company, or any person acting on behalf of the same, previously to any such petition, nor any action, suit or other proceedings pending at the date of such petition."

Sect. 73. "That after the first appointment of an official manager no creditor or other person shall, except so far as the master shall permit, have power to commence or to proceed with any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as hereinafter mentioned ; and it shall be lawful for any Judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the master."

Sect. 75. "That the master shall, upon proof made or offered and exhibited before him of the debts and demands due or claimed from or against the company, or any of them, either allow or disallow, or allow as claims only, such debts and demands respectively, according to the nature of the case, and of the proofs adduced or exhibited before him, and shall, by writing under his hand, declare such allowance and disallowance, or such allowance as claims only."

Brett v. Dawson.

which directs an advertisement for the purpose of creditors coming in to prove their debts, occurs before the 73d section, which relates to staying proceedings, and shows that the proof of debts might take place before the appointment of the official manager. The interim manager is the same as a provisional manager; the name is not descriptive of his office, but only means that he is not the permanent manager. By a comparison of the 20th and 50th sections it will be found that the latter contemplates that an action may be brought by interim managers.

POLLOCK, C. B. I am of opinion that this rule should be discharged. Several points were made in showing cause, and there may be considerable doubt as to the true construction of the statute, but it is sufficient to dispose of this rule by the decision of the point on which it was granted. It appears to me that there is not such an identity between the official and interim manager as to deprive the plaintiff of the benefit of the 58th section, which enacts, that the rights of the creditors shall not be diminished, except where expressly provided. I think that there is no express provision as to staying the proceedings upon the appointment of the interim manager, and that there is a wide distinction between the duties of the interim and official manager.

PARKE, B. I did at one time entertain considerable doubt upon this point. It is our duty to adhere to the ordinary and grammatical construction of the words in reading these acts of parliament, and I am convinced that there is a considerable distinction between the official and the interim manager. I therefore entirely concur, and think it unnecessary to decide the other points raised.

ALDERSON, B. I do not entertain a doubt that there is a broad distinction between the official and the interim manager. The one is appointed until the other is; and if both were the same, "interim" would be an absurd expression. The duties of the interim manager are, under the direction of the master, to collect and receive and dispose of the property of the company, that is by the 20th section, and then it goes on to say: provided that no action or suit shall be prosecuted against any interim manager otherwise than by the style and designation of the official manager of the company. If he really is official manager, what need of a provision that in such a case he shall be so called? Then I find that when an official manager is appointed, he has different duties to perform; he has the custody of the books of account, deeds, instruments, cash, bills, notes, papers, and writings of the company, which the interim manager has not, and all the estate of the company is to vest in him; he is to make out a list of contributories, and lay the same before the master, and the master is then to proceed to wind up the affairs of the company. These are briefly the duties of the one as compared with the duties of the other. The 73d section provides that after the appointment of an official manager, no action shall be proceeded with without proof of the debt. Here no

 Dobson v. Brocklebank.

official manager has been appointed, and I think suits are not to be stopped until after such appointment.

PLATT, B., concurred.

Rule discharged with costs.

DOBSON v. BROCKLEBANK.¹

January 31, 1852.

Judgment as in Case of Nonsuit — Delay after Removal of Injunction.

Obtaining an injunction to stay the proceedings does not deprive the defendant of his right to move for judgment as in case of nonsuit.

Where subsequent to the removal of the injunction, the plaintiff gave notice of trial, but did not try, the defendant was held to be entitled to move for judgment as in case of nonsuit; and, *semble*, that the time for proceeding to trial, according to the practice of the court, runs from the removal of the injunction.

Issues having been joined in this cause on the 5th of November, 1850, the defendant obtained an injunction to stay the proceedings on the 9th of November, 1850, which was dissolved on the 30th of November. The plaintiff gave notice of trial on the 12th of June, 1851, but did not try pursuant to this notice, and he gave a similar notice on the 2d of November, 1851, and again made default. A rule for judgment as in case of nonsuit having been obtained.

Raymond showed cause.* The question is whether the defendant having once prevented the plaintiff from proceeding to trial, can avail himself of the statute. The first default was caused by the act of the defendant, and he must now take the cause down by proviso. *Anon.*, 1 Chit. 280, n.

Maynard, contra. In that case, the application seems to have been made pending the injunction. The only effect of the injunction is to suspend the proceedings, and the plaintiff ought to go to trial within the proper time after its removal. Moreover there was a second default, and this case is within the decision of *Garven v. Birch*, 11 Mee. & W. 544. There the plaintiff abstained from trying the cause at the assizes for which he had given notice of trial, in consequence of a proposal from the defendant that it should await the event of another action; and it was held by Parke, B., that although the not going to trial at the first assizes was excused, yet it was a default not to go to trial at the assizes after the action referred to was disposed of, and that the defendant was entitled to move for judgment as in case of nonsuit.

Cur. adv. vult.

¹ 21 Law J. Rep. (N. S.) Exch. 96; 16 Jur. 176.

² January 24, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

Hart v. The Eastern Union Railway Company.

Judgment was now delivered by

POLLOCK, C. B. In this case the question was whether the effect of an injunction obtained by the defendant to prevent the trial of a cause is to be considered as such an impediment to the proceedings of the plaintiff, that he is thereby relieved from taking down the cause for trial, or whether it is merely an interruption that ceases as soon as the injunction is removed, and it becomes the duty of the plaintiff to go on to trial according to the practice of the court. We are of opinion that the plaintiff is bound according to the practice of the court to go on as soon as the injunction is removed. On the present occasion the injunction to stay the trial was very shortly after issue joined: the injunction was dissolved shortly afterwards; and the plaintiff subsequently gave notice of trial. The injunction being dissolved, on the 12th of June, 1851, he gave notice of trial for the 14th of June, 1851; on the 22d, he again gave notice of trial on the 2d of November, but did not go to trial. Probably, independently of these two notices of trial being given, it may be that the plaintiff was bound to go on according to the practice of the court, but no doubt when he has twice given notice of trial, and twice failed, it is very unreasonable that he should now say, "I will not go to trial because you obtained an injunction to suspend the proceedings for a certain time." We are of opinion, therefore, that the plaintiff must go to trial. Therefore, the rule for a nonsuit must be made absolute. If the plaintiff will give a peremptory undertaking to proceed as soon as, according to the practice of the court, he may proceed, the rule will be discharged; if not, it will be made absolute.

Rule absolute for a nonsuit unless plaintiff give a peremptory undertaking.

HART & another v. THE EASTERN UNION RAILWAY COMPANY.¹

January 13, 1852.

Railway Company—Mortgage Deed—Property mortgaged—Principal Money, Right of Action for—Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 42, 50, and 53.—Local Acts, Construction of.

A railway act, 7 & 8 Vict. c. 85, enacted, section 51, that if any interest due on any mortgage to the company should remain unpaid for thirty days after it had become due, and demand thereof had been made in writing, the mortgagee might sue for the interest in the superior courts, or require the appointment of a receiver. The 52d section enacted that if the principal money and interest were not paid within six months after it had become payable, and after demand in writing, the mortgagee might sue for the same in the superior courts. The 10 & 11 Vict. c. 174, (July 9, 1847,) repealed the above act, but by the 43d section reenacted in substance the 52d section of the repealed act, so far as regarded the recovery of the interest due. The 10 & 11 Vict. c. 225, (July 22, 1847,) under which the money

¹ 21 Law J. Rep. (N. S.) Exch. 97.

Hart v. The Eastern Union Railway Company.

hereinafter mentioned was borrowed, enacted, section 8, that the several provisions in certain recited acts, amongst which was the repealed act, 7 & 8 Vict. c. 85, should apply to moneys "by this act authorized to be borrowed." The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, in section 50, that "the company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereon, and in such case the company shall cause such period to be inserted in the mortgage deed or bond, and upon the expiration of such period the principal sum together with the arrears of interest thereon shall, on demand, be paid to the party entitled to such mortgage or bond." The defendants, a railway company, having borrowed 1,000*l.* of the plaintiffs, executed to them a mortgage deed in the form given in Schedule C, annexed to the Companies Clauses Act. The deed contained the following stipulation:—"The principal sum to be paid on the 1st day of January, 1851."

An action having been brought by the plaintiffs to recover the principal sum lent:—

Held, first, that the stipulation in the mortgage deed, that the principal sum was to be repaid on the 1st of January, 1851, imported a covenant by the defendants for the repayment of that sum on that day; that by virtue of that clause and of the Companies Clauses Act, section 50, if that sum were not repaid on the day fixed, the plaintiffs had a right of action for the recovery thereof, and that such right was not taken away, or affected by any other part of the Companies Clauses Act, or by the special acts.

Secondly, that the effect of the deed was to pledge the tolls and property of the company as proprietors but not their stock or property as carriers, and that the judgment in any action brought against them for the recovery of the principal money would be satisfied out of their general property not comprised in the pledge belonging to them as carriers or otherwise.

Thirdly, that section 52 of the 7 & 8 Vict. c. 85, did not give a right of action for the principal money, but recognized it as already existing, and in addition to, or instead of that right, gave a right of having a receiver appointed; that, therefore, the repeal of that section would not take away such right of action.

Lastly, that the existence of such right of action was also recognized by the 53d section of the Companies Clauses Act.

DEBT. The declaration stated "that after the passing of four acts of parliament, to wit, The Eastern Union Railway Act, 1844, The Eastern Union Railway Amendment Act, 1845, The Eastern, Union, Hadleigh, and Colchester Railway Act, 1846, and an act of 11 & 12 Vict. intituled "An Act to amalgamate the Eastern Union and Ipswich and Bury St. Edmunds Railway Companies," and after the making of the deed of mortgage, hereafter mentioned, it was proved to the satisfaction of the Commissioners of Railways and certified by them, that one half of the whole amount of the capital, exclusive of loans, by the several acts of parliament relating to the company, namely, the Eastern Union Railway Company, mentioned and referred to in the first-mentioned act of parliament; authorized to be raised, and also half of the capital authorized to be raised by the acts of parliament relating to the Ipswich and Bury St. Edmunds Railway Company, mentioned and referred to in the said act fourthly above mentioned, had been actually paid up and expended for the purposes authorized by the several acts of parliament relating to the said two last-mentioned companies respectively; and that thereupon and by virtue of the act of parliament fourthly above mentioned, the defendants became incorporated by the said name of the Eastern Union Railway Company. That after the passing of the said acts of parliament and of the Eastern Union and Harwich Railway and Pier Act, 1847, and before the granting of the certificate, the Eastern Union Railway Company, in pursuance of the provisions of the said last-mentioned act, and also of an order of a general meeting of the

Hart v. The Eastern Union Railway Company.

last-mentioned company them empowering, by a certain deed of mortgage, in consideration of 1,000*l.* by the said company then borrowed at interest from the plaintiffs, the company did assign to the plaintiffs the undertaking in the said last-mentioned act mentioned, and all the tolls and sums of money arising by virtue of that act, and all the estate, right, &c. of the company in the same, to hold unto the plaintiffs until the sum of 1000*l.* with interest at 5*l.* per cent. should be satisfied, and by the said deed it was stipulated that the principal sum of 1000*l.* should be repaid on the 1st of January, 1851, being the period fixed by the company for the payment thereof, which period elapsed after the certificate, before the demand hereafter mentioned, and before action. Averment, that before the making of the said order of the said general meeting and the borrowing of the money, all the moneys by the acts of parliament, first, secondly, and thirdly above mentioned, authorized to be raised by shares, had been subscribed for, and that half thereof had been paid up, and that the sum so borrowed of the plaintiff did not, at the time of the borrowing, and at the date of the mortgage, together with other sums then borrowed under the authority of the said acts, exceed the sum of 66,666*l.* in addition to the sum which, by the said three last-mentioned acts, the Eastern Union Railway Company was empowered to borrow, and that from the making of the said deed the plaintiffs have been and still are the holders of and entitled to the said deed of mortgage, and that the said principal sum of 1,000*l.* was not paid to the plaintiffs on the 1st of January, 1851, but that the said principal sum is still due. The declaration then stated a demand of payment of the 1,000*l.*, and non-payment by the defendants.

The plea craved oyer of the mortgage deed, which was in these words:—"Eastern Union Railway Company. Debenture bond, 1,000*l.* Mortgage No. 112. By virtue of an act passed on the 22nd day of July, 1847, intituled 'The Eastern Union and Harwich Railway and Pier Act,' we, the Eastern Union Railway Company, in consideration of the sum of 1,000*l.* paid to us by J. G. Hart, of Stowmarket, in the county of Suffolk, Esquire, and Charles Robert Bree, of Stowmarket, in the county of Suffolk, surgeon, do assign unto the said J. G. Hart and Charles Robert Bree, their executors, administrators, and assigns, the said undertaking, and all the estate, right, title, and interest of the company in the same, to hold unto the said J. G. Hart and Charles Robert Bree, their executors, administrators, and assigns, until the said sum of 1,000*l.*, together with interest for the same, at the rate of 5*l.* for every 100*l.* by the year, be satisfied, *the principal sum to be paid on the 1st day of January, 1851.* Given under our common seal," &c. The defendants then pleaded that they borrowed from various other persons divers sums of money, parcels of the 66,666*l.*, and executed to them mortgages of the same tolls and sums of money as are mentioned in the deed-poll, and in the form given in Schedule C; that the 1,000*l.* mentioned in the declaration was another parcel of the 66,666*l.*; that the said sums are still unpaid, and that the sums applicable for the payment thereof are insufficient; that for securing to the said mortgagees their proportions it was necessary

Hart v. The Eastern Union Railway Company.

for a receiver to be appointed to divide the same ratably, or that some other course, not being an action at law, should be adopted, and that the present action was brought for the purpose of obliging the defendants to pay to the plaintiffs more than their just proportion of the mortgaged tolls and sums of money¹.

Demurrer.

¹The 7 & 8 Vict. c. 85. "An act for making a railway from Colchester to Ipswich," section 51. And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs of any such mortgage or bond at the respective times at which such interest, or such principal and interest and costs become due, be it enacted, that if such interest or any part thereof shall for thirty days after the same shall have become due, and demand thereof shall have been made in writing, remain unpaid, the mortgagee or bond creditor may either sue for the interest so in arrear by action of debt in any of the superior courts, or he may require the appointment of a receiver by an application to be made as hereinafter provided."

Sect. 52. "And with respect to such principal money, interest, and costs, be it enacted, that if such principal money and interest be not paid within six months after the same has become payable, and after demand thereof in writing, the mortgagee or bond creditor may sue for the same in any of the superior courts of law or equity; or if his debt amount to the sum of 5,000*l.* he may alone, or if his debt does not amount to the sum of 5,000*l.* he may in conjunction with other mortgagees or bond creditors whose debts being so in arrear after demand as aforesaid shall together with his amount to the sum of 10,000*l.*, require the appointment of a receiver, by an application to be made as hereinafter provided."

The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. Sect. 42. "The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another, by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized."

Sect. 50. "The company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the company shall cause such period to be inserted in the mortgage-deed or bond, and upon the expiration of such period, the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond; and if no other place of payment be inserted in such mortgage-deed or bond, such principal and interest shall be payable at the principal office or place of business of the company."

Sect. 53. "Where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest due on such mortgage by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts of law or equity, require the appointment of a receiver, by an application to be made as hereinafter provided, and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the superior courts of law or equity, may, if his debt amount to the prescribed sum alone, or if his debt does not amount to the prescribed sum he may in conjunction with other mortgagees whose debts being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided."

The 10 & 11 Vict. c. 174. "An act to amalgamate the Eastern Union and Ipswich and Bury St. Edmunds Railway Companies," (9th of July, 1847.) Sect. 43. "And

Hart v. The Eastern Union Railway Company.

Mellish (O'Malley with him) for the plaintiffs, in support of the demurrer to the plea. The plea is bad, and the question will turn on the sufficiency of the declaration. The declaration is good, for the plaintiffs have a right of action against the company for the recovery of the principal money lent. The point turns chiefly upon the construction to be placed upon the set of sections in the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, from sect. 38 to sect. 55, inclusive. Of these sections the 42d, 50th, and 53d are the most material. The 50th section empowers companies to fix a time for repayment of the money borrowed, at the expiration of which time the principal and interest are to be repaid on demand. The 53d section empowers the mortgagees to enforce payment of the principal and interest due, by requiring the appointment of a receiver, without prejudice however to their right of suing at law for the interest. If a receiver is appointed under this act, he would be bound to take the profits and tolls of the railway company. The 42d and 44th sections of the Companies Clauses Consolidation Act do not give the mortgagees and bond creditors of a railway company a specific lien upon the goods and chattels of the company—*Russell v. the East Anglian Railway Company*, 3 Mac. & G. 104; s. c. 1 Eng. Rep. 101; and it may be doubtful whether the Court of Chancery has jurisdiction to appoint a receiver and manager of a railway. Again, under a mortgage by a railway of "the property of the undertaking, and of the rates, tolls, and other sums arising or to arise by virtue of the Railway Act," it was held that the mortgagee did not acquire a title to the land, and could not bring ejectment. *Pontet v. The Basingstoke Canal Company*, 3 Bing. N. C. 433; s. c. 6 Law J. Rep. (N. S.) C. P. 177 shows, that lenders of money to canal companies have great difficulty in recovering the interest. Since, therefore, a mortgage passes no interest in the real or personal property of the company, and gives scarcely any interest in the profits of the concern, as there exists great difficulty in getting the tolls of a railway paid, the mortgagees ought to possess the power of bringing actions for the interest and principal. The 42d section merely enacts, that the mort-

in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs of any such mortgage or bond as may have been or may be granted by either of the dissolved companies, or by the new company, at the respective times at which such interest or such principal and interest and costs become due, be it enacted, that if such interest or part thereof shall for thirty days after the same shall have become due, and demand thereof shall have been made in writing, remain unpaid, the mortgagees or bond creditor may either sue for the interest so in arrear by action of debt in any of the superior courts, or he may require the appointment of a receiver, according to the provisions in that behalf contained in the said Companies Clauses Consolidation Act."

The 10 & 11 Vict. c. 225. "An act to empower the Eastern Union Railway Company to make a railway from the Eastern Union Railway at Manningtree to Harwich, with branches thereout, and for other purposes." Sect. 8 enacts, "that the several provisions of the said recited acts, with regard to the borrowing of the moneys thereby authorized to be borrowed, and the conversion thereof into capital, and as to the creation of shares or stock in lieu of borrowing the same, and as to consolidating the old with the new shares of the company, shall equally apply to the moneys by this act authorized to be borrowed and the shares by this act authorized to be created."

Hart v. The Eastern Union Railway Company.

gagees are to be entitled one with another to their proportions of the tolls, &c., without any preference by reason of priority of the date of the mortgage. Then, the 50th section enacts, that on the expiration of the time fixed for payment, the principal and interest shall on demand be paid to the mortgagee. The meaning of that section cannot be that all the mortgagees shall be bound to make a demand; it must mean, that any mortgagee who makes a demand and meets with a refusal, may bring an action for the principal money.

Bramwell (*Cayley* with him) for the defendants. The legislature never intended that one creditor should stand out against all the other creditors of a railway company for the principal money lent, and by bringing an action prevent the company from carrying on their trade. It never was designed that one mortgagee should have an advantage over another. If it had been intended that a mortgagee should have a right of action for the principal, the legislature would have said so in express terms. In this case the form of the bond is given in the schedule, and without doubt the words of that instrument do not give a right of action. All the rights and remedies that a mortgagee of a railway company possesses are given by the acts of parliament.

[MARTIN, B. Does a party require an act of parliament to enable him to recover money that he has lent?]

There may be such a thing as a mortgage debt without any power of bringing an action to recover it. That clause in the mortgage-deed which relates to the payment of principal and interest on the 1st of January, 1851, is a mere memorandum and nothing more. The company were not bound to fix a period for repayment, as it appears by section 50, and if they did so it was not the intention of the legislature that a contract to repay at that period should be created, which should be capable of being enforced by action. The mortgagees are in no better situation when a period is fixed for repayment than if none had been fixed. In this case there is not a covenant to repay, but merely an assignment of the tolls and sums of money. The words in the 53d section of the Companies Clauses Act, "without prejudice to his right to sue for the interest," do not recognize the existence of any right to sue; they were merely inserted *ex majori cautela*, lest they should be thought to take away any right that might by possibility exist.

[ALDERSON, B. In the same way that the words "without prejudice to the rights of the crown," inserted in acts of parliament, do not imply that the crown actually has any right.]

That is the argument. Secondly, there is a material difference between the 42d and the 45th sections. The 42d relates to the rights of mortgagees, the 44th to those of the obligees of the bonds. The language of the 42d section is, that the mortgagees are to be entitled to the tolls, calls, &c., but the 44th section enacts that the obligees are entitled to be *paid* the amount.

[PARKE, B. Your argument is, that the mortgagees are entitled to a share in the things mortgaged; but that the bondholders are entitled to actual payment.]

Hart v. The Eastern Union Railway Company.

That is the argument. The 53d section gives the creditor a sufficient remedy for repayment. He referred to *Pontet v. the Basingstoke Canal Company*, and *Doe d. Myatt v. the St. Helen's and Runcorn Gap Railway Company*, 2 Q. B. Rep. 364; s. c. 11 Law J. Rep. (N. S.) Q. B. 6. Again, the language and enactments of the local acts show, that the plaintiffs are not entitled to recover the principal money. The 7 & 8 Vict. c. 75, (1844) by sections 51 and 52 gives a mortgagee and bondholder the right of recovering both interest and principal. The 8th section of the 10 and 11 Vict. c. 225 (July 22, 1847) incorporates the provisions of certain recited acts, namely, the 7 & 8 Vict. c. 85, and two other acts. But then at that time the 7 & 8 Vict. c. 85 had been repealed by the 10 & 11 Vict. c. 174 (9th of July, 1847). Now, the 53d section of 10 & 11 Vict. c. 174 gives a power of recovering interest only, but not principal. It must, therefore, be considered that the power of suing for the principal money having been deliberately taken away, and a right of suing for the interest only having been substituted, the legislature did not intend that any power of suing for the principal should belong to the mortgagees. Again, if the court should be of opinion that the plaintiffs have a right to recover the principal money under the 53d section of the Companies Clauses Act, the declaration is bad in not stating that the six months mentioned in that section have elapsed, and that there has been a demand in writing.

Mellish, in reply. First, with respect to the objection that the declaration does not state that six months have elapsed, or that any demand in writing has been made, it is enough to say that this objection, being taken on general demurrer to the declaration, is good. Secondly, the 50th section of the Companies Clauses Consolidation Act, which is incorporated in these private acts of parliament, states, that where a time is fixed for repayment the principal and interest shall be paid on demand to the party entitled to such mortgage or bond. The meaning of this is plain, and there is nothing in the 42d section of that act at all repugnant to this view of the case. The argument on the other side gives no effect to this language of the 50th section. Lastly, with respect to the argument *ab inconvenienti* as to some creditors having a preference over others, that argument applies to the case of bonds as well as mortgage-deeds, and yet it is clear that an action will lie upon a bond — *Pontet v. the Basingstoke Canal Company*.

Our. adv. vult.

The judgment of the court¹ was now delivered by —

PARKE, B. His lordship stated the declaration and the deed-poll, as set out on oyer, and proceeded — The plea in this case is given up, and the question arises on the sufficiency of the declaration, importing into it the form of the instrument; and the point to be decided is, whether an action will lie against the Eastern Union

¹ PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

Railway Company. If we regard the form of the instrument only, without reference to the legislative provision contained in the several local and personal acts relating to this company, and those in the Railway Clauses Consolidation Act, (8 & 9 Vict. c. 16,) we think that an action is maintainable upon it. The first part merely assigns, in consideration of 1,000*l.*, the undertaking and all the tolls and sums of money arising by virtue of the act, to hold until the sum of 1,000*l.*, with 5*l.* per cent. interest per annum, should be satisfied. If the instrument had stopped there, it would have operated simply as a transfer (commonly but improperly called a mortgage) of the subject-matter till the sum was satisfied thereout. The subject conveyed would be the tolls,—certainly the unpaid calls and all that belonged to the company, as the proprietors of the railway, which any one is at liberty to use, on paying tolls, but not the stock or property belonging to the company as common carriers of passengers or goods for hire, nor, according to the case of *Doe v. the St. Helen's and Runcorn Gap Company*, the soil of the railway itself. The railway acts have been prepared on the model of the canal acts, in which the principal object of the company was the proprietorship of the canal, and the profit there will be from the use of it by the public in general; but soon after the establishment of railways it was found that the companies alone could use them beneficially by themselves, monopolizing the conveyance upon them; so that the theory of these acts and the practice under them are entirely at variance. So far the instrument we are considering would give no right of action to the plaintiffs, and would resemble that of *Pontet v. The Basinstoke Canal Company*, but in the conclusion there is a stipulation that the principal is to be paid on the 1st of January, 1851, and this certainly imports a covenant by the company that the same shall be repaid on that day unless there be something in the acts to qualify or alter the meaning of that expression. The effect, then, of the instrument would be to pledge the tolls and property of the company *as proprietors*, but not their stock or property as carriers, and to impose an obligation on them to repay the principal on a certain day, for the breach of which an action would lie against the company; the judgment in which action would be satisfied out of their general property, not comprised in the pledge belonging to them as carriers or otherwise. It remains to be considered what the effect of the statute is upon the construction of the instrument. The money appears, by the statement in the declaration, to have been borrowed under the powers of the statute 10 & 11 Vict. c. 225. The statute contains no clauses as to the form or effect of the securities for the money borrowed under its provisions, but they refer to certain prior railway acts, which are the 7 & 8 Vict. c. 85, 8 & 9 Vict. c. 94, 9 & 10 Vict. c. 97, and to the Railway Clauses Consolidation Act, (8 & 9 Vict. c. 16,) enacting that all the provisions contained in the recited acts, so far as the same were then in force, and except such as were inconsistent with the provisions of the Lands and Railways Clauses Consolidation Acts, 1845, and except such as by that act were altered or otherwise provided for, should extend to

such act, and the purposes thereof, as fully and effectually as though such provisions were reënacted in that act. The next section extends all the provisions of the Lands and Railways Clauses Consolidation Acts to that act, and also the 10 & 11 Vict. c. 174, (local and personal,) save so far as they may be inconsistent with the provisions thereinbefore contained of the said acts, and it shall, for the objects and purposes thereof, be read as one act. There is no small difficulty in construing an act made up from different parts of other acts, partly repealed and partly not; but upon the best consideration we can give, the result is, that the acts do not affect the right of action for the principal. The 7 & 8 Vict. c. 85, s. 51, provides a remedy for the interest, if in arrear for thirty days after demand in writing, by allowing the mortgagee to sue for the interest by an action of debt in any of the superior courts, or by requiring the appointment of a receiver. Section 52 provides a similar alternative remedy for the principal, if it be not paid in six months after due and after demand in writing, in which case the mortgagee may either sue in the superior courts or have a receiver. But this act was repealed by the 10 & 11 Vict. c. 174, (local and personal,) s. 2, and, therefore, was not in force at the time of passing the 10 & 11 Vict. c. 225, (local and personal;) and then the 10 & 11 Vict. c. 174, which speaks of providing for the recovery of the arrears of interest and costs, or of the principal and interest and costs, provides for a right of action for the interest, or the appointment of a receiver to recover its payment; and this creates a doubt whether the legislature did not intend to take away the right of action for the principal altogether, leaving the mortgagee a right of action for the interest, and if that was unpaid for thirty days, and a demand had been made in writing, a right to have a receiver, and by that means to recover both; but sections 51 and 52 of the repealed act of the 7 & 8 Vict. c. 85, are susceptible of a different construction, namely, that in case the interest in the one case, or the principal in the other, might be in arrear for the time prescribed, and demand should be made in writing, the mortgagee might either use the right of action to recover it which he had already by law, or he might have a receiver appointed. The sections may be construed not to give a right of action, but to recognize it as already existing, and to give the right of having a receiver instead; for in addition to that, and after thirty days' or six months' delay in the payment of interest or principal, as the case might be. The repeal, therefore, of the 52d section would not take away the right of action, for it existed independently of that clause. The framers of the act probably thought it unnecessary to reënact the 52d section, as its place would be supplied by the 53d section of the Companies Clauses Consolidation Act, which provides for the application of the remedy of a receiver, where the principal is in arrear for six months and demand made in writing, and also enacts that it shall be exercised without prejudice to the right to sue for the principal, which right it thereby recognizes. To this it may be added, that the Companies Clauses Consolidation Act, by section 50, expressly provides, that if a day is fixed for the payment of the money secured by the mortgage, the money must be paid on

Roe v. Fuller.

that day to the party interested, and the meaning must be that if then not paid, it must be enforced by action. We are, therefore, of opinion, that the right of suit which the mortgagee had under such an instrument as that declared upon it, is not taken away or affected either by the Companies Clauses Consolidation Act, or any of the special acts referred to in the statute 10 & 11 Vict. c. 225, under which the mortgage in question was given; and, therefore, the plaintiffs are entitled to recover.

Judgment for the plaintiff.

ROE, Public Officer of the Birks Union Banking Company, v. FULLER.¹

January 30, 1852.

Pleading — Several Pleas — Joint-Stock Banking Company — Public Officer.

In an action by the public officer of a banking copartnership, the court allowed a plea denying that the copartnership were, at the commencement of the suit, carrying on the business of bankers, in addition to pleas of non-assumpsit and accord and satisfaction.

THIS was a rule calling on the plaintiff to show cause why the defendant should not be at liberty to plead: first, non-assumpsit; secondly, a denial that the copartnership were, at the commencement of the suit, carrying on the business of bankers *modo et forma*; thirdly, accord and satisfaction. The declaration stated the plaintiff to be one of the registered public officers, for the time being, of and for certain persons carrying on the trade and business of bankers in England, by the name of The County of Birks Union Banking Company, and who sued as such public officer as aforesaid. A judge at chambers had, on the authority of *Needham v. Law*, 11 Mee. & W. 400; s. c. 12 Law J. Rep. (n. s.) Exch. 316, disallowed the second plea, stating that the defendant might apply to the court. A rule *nisi* was accordingly obtained, against which

Lush showed cause for the plaintiff. The case of *Needham v. Law* is in point. There the court refused to allow a defendant, who was sued as a public officer of a banking company, to plead, in addition to pleas of fraud, &c., a plea that he was not a public officer at the commencement of the suit. The plea contains mere matter of form.

Gray, in support of the rule. The constant practice has been to allow this plea. *Steward v. Dunn*, Ibid. 63; s. c. 12 Law J. Rep. (n. s.) Exch. 213; *Hughes v. Thorpe*, 5 Mee. & W. 656; s. c. 9 Law J. Rep. (n. s.) Exch. 109; and *Steward v. Greaves*, 10 Ibid. 711; s. c. 12 Law J. Rep. (n. s.) Exch. 109, are in point. But the case which most resembles the present is *Davidson v. Cooper*, 11 Ibid. 778; s. c. 12 Law

¹ 21 Law J. Rep. (n. s.) Exch. 104.

Cleave v. Jones.

J. Rep. (N. S.) Exch. 467. There the defendant pleaded that at the commencement of the suit there were not, nor are there, persons united in copartnership carrying on the trade or business of bankers in Manchester under the name, style, &c. (He was then stopped by the court.)

POLLOCK, C. B. The rule must be absolute. The last case cited sufficiently shows that the plea in question ought to be allowed.

PARKE, B., concurred.

ALDERSON, B. That case is exactly in point.

PLATT, B., concurred.

Rule absolute.

CLEAVE v. JONES.¹

February 10, 1852.

Attorney and Client—Privileged Communication—Collateral Issue—Duty of Judge.

In an action by the payee against the maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts and payments of her late husband, adding, "This from you will assist me in preparing the case for counsel," whereupon the book in question was sent to the plaintiff. The judge, having heard the evidence, rejected the book:—

Held, that the communication was privileged.

A judge is bound to decide the preliminary question of fact whether a communication is privileged or not; and his decision, if erroneous, may be reviewed.

Per *Martin, B.*, a communication by a client to his attorney made under a *bond fide*, although mistaken, belief of its being necessary to his case, is privileged.

ASSUMPSIT by the plaintiff, as payee of a promissory note for 350*l.*, made by the defendant on the 2d of May, 1840, and payable on demand.

Pleas, among others, *non fecit*, and the Statute of Limitations.

At the trial, before Erle, J., at the Herefordshire Summer Assizes, 1851, the facts were these. The note was given for money lent by the plaintiff to the defendant, and the plaintiff, for the purpose of taking the case out of the Statute of Limitations, gave in evidence an account-book of the defendant containing, amongst other matters, an entry in her writing, purporting to be an entry of a disbursement by her in 1843, in the words and figures following:—"1843.

¹ 21 Law J. Rep. (N. S.) Exch. 105.

Cleave v. Jones.

Cleave's interest on 350*l.*, 17*l.* 10*s.*”¹ The counsel for the defendant thereupon stated to the judge that the communication of the contents of the book was privileged, having been made by the defendant to the plaintiff during the time that the latter was acting as her solicitor, and in consequence of the following letter, which was written and sent by the plaintiff to the defendant:—“Dear Mrs. Jones, — Will you let me know what your statement is of the debts due from your late husband at the time of his decease, and what have been paid, by whom, and out of what fund. *This from you will assist me in preparing the case for counsel.*”

The defendant's counsel then called the daughter of the defendant, who proved that in consequence of the above letter the defendant sent the account-book to the plaintiff. The judge having heard the evidence in support of this collateral issue ruled that the account-book had been delivered by the defendant to the plaintiff confidentially as her attorney; and, therefore, could not be used by him as evidence against her. He, therefore, refused to receive the book, and the plaintiff was nonsuited.

Whateley, having obtained a rule *nisi* for a new trial on account of the improper rejection of this evidence, —

Gray showed cause. The entry in the book was a privileged communication, and was properly rejected. It was made to the attorney to enable him to lay the case before counsel. It was urged on the motion for the rule, that the communication was not privileged, because the plaintiff was aware beforehand of the sum of 17*l.* 10*s.* having been paid to him by way of interest, and, therefore, did not require the information. In one sense, indeed, he might know the fact, but in another he could not know it, for he could not have that knowledge of it which would enable him to depose to it in a witness-box, which is the criterion of his having that knowledge of it that would make the communication of it not privileged. In cases of this description the ground of the privilege is, that the client may be induced, in his communications with his legal adviser, to make the necessary disclosures without any restraint. The information communicated by the defendant to the plaintiff had reference to the executorial accounts. It was, therefore, necessary to include the item in question in the account.

[ALDERSON, B. Suppose the communication to have been made to the attorney as to a debt paid to a third person, and the attorney becomes administrator of that third person, would that circumstance make any difference? The other side are attempting, by nice and fine distinctions, to fritter away a privilege which ought to be large and liberal.]

In *Wheatley v. Williams*, 1 Mee. & W. 533; s. c. 5 Law J. Rep. (N. s.) Exch. 237, Lord Abinger, C. B. says, “The passage cited by Mr. Platt from *Buller's Nisi Prius* must apply to a case where the

¹ See *Cleave v. Jones* (in error,) 20 Law J. Rep. (N. s.) Exch. 238; s. c. 4 Eng. Rep. 514.

Cleave v. Jones.

attorney has his knowledge independently of any communication from the client; it cannot mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information, which he would not otherwise have possessed, he can be compelled to disclose it."

[ALDERSON, B. That means that he is precluded from disclosing it. Then can it make any difference that he discloses it for his own benefit?]

He cited the judgment of Maule, J. in *Newton v. Chaplin*, 19 Law J. Rep. (N. S.) C. P. 374, and *Cromack v. Heathcote*, 2 B. & B. 4. (He was then stopped by the court.)

Whateley and Keating, in support of the rule. The evidence was improperly rejected. This is a new point. The general point is not denied, nor is the authority of *Cromack v. Heathcote* questioned; but this case does not fall within that authority. The rule relied on by the other side does not apply to a case where the attorney to whom the communication is made seeks to use it for his own benefit.

[ALDERSON, B. According to that argument, if I hand my title-deeds to an attorney, he may bring an ejectment against me upon a flaw which he has discovered in my own deeds.]

The argument must, undoubtedly, go that length. The information in question was never asked for nor required by the attorney; it was thrust upon him by the defendant. Besides, the facts show that in respect to the communication in question he was not acting in his character of attorney. Again, the learned judge was wrong in trying this collateral issue relating to privilege. He was not in a position to inquire into the question of privilege. The rule as to collateral issues is thus laid down in 1 Taylor on Evidence, 623:—"Indeed it has been more than once laid down that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, provided they be pertinent to the issue, for the court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it raise an issue to determine the question." Now, if the courts will not try a collateral issue relating to the mode of obtaining a document, they will not try in this case the question of a confidential communication.

[PARKE, B. Surely, if an attorney had improperly handed over a document to a third party, that party might give it in evidence. That part of the case of *Lloyd v. Mostyn*, 10 Mee. & W. 478; s. c. 12 Law J. Rep. (N. S.) Exch. 1, which asserts the contrary has been questioned.]

The point as to whether this is a confidential communication does not properly arise in this case.

[PARKE, B. All collateral matters, as, for instance, the admission of evidence, are for the judge. This is a very clear point. There may be some inconvenience in this course, but it is necessary for the administration of justice. In a criminal case at York, some years

Cleave v. Jones.

ago, which was to be tried by me, I became aware beforehand that a collateral question as to the insanity of a party would arise; and, therefore, before I went the circuit, I consulted the judges as to the course I ought to pursue. They were of opinion that I was bound preliminarily to receive evidence of insanity, and try the question; and, accordingly, witnesses were examined collaterally on the point of insanity. I was of opinion that the party was sane, and I received his testimony; the jury, however, disbelieved him.]

They cited *Greenough v. Gaskell*, 1 Myl. & K. 98, and *Weeks v. Argent*, 16 Mee. & W. 817; s. c. 16 Law J. Rep. (N. S.) Exch. 209.

PARKE, B. This rule must be discharged. The first question is, whether the communication of the account was made to the plaintiff as an attorney, or as a creditor of the defendant. If it were made to him as creditor, he would be at liberty to give it in evidence; but not so if it were made to him as attorney. If it be alleged on the trial to be made to him in his character of attorney, the judge would have to determine as a fact the preliminary question, as to whether it was so offered. Here, an objection was made to the reception of this account, and the judge received evidence on behalf of the defendant on the point, and afterwards decided that the account was handed to the plaintiff not as a creditor, but as attorney in the cause, to enable him to prepare a case for counsel. I think he was warranted in that judgment. The account was not prepared until the plaintiff wrote to the defendant asking her for an account, in order that he might prepare a case for counsel. All the contents of that book were privileged, and within the rule on that point, the object of it being that all the facts of the case and the full truth may be told by the client to the attorney without any reserve. It is contended on the part of the defendant, that as the payment of this sum was known to the plaintiff, he was at liberty to make use of the information stated in the book, and to produce it for the purpose of proving his case. But I think he cannot make use of a communication which was made to him on the faith of its being kept a secret. I entertain no doubt, either upon the question of the communication being privileged, or as to the correctness of the course taken by the judge, in trying collaterally the question of the privilege.

ALDERSON, B. I am of the same opinion. It is conceded, that as to all items except that which relates to the 17l. 10s. the communication is privileged. I, however, am unable to separate one part from the rest, and think, that either the whole is to be rejected or the whole received.

PLATT, B. I am of the same opinion. [His lordship stated the facts.] The plaintiff having, at the trial, relied upon an account for the purpose of taking the case out of the Statute of Limitations, the defendant made a technical objection, in consequence of which the document was rejected. We may, therefore, assume that the debt was due, and that the defendant had no other mode of defeating the

Cleave. v. Jones.

action except that which she pursued. I cannot help thinking it a hard matter that the plaintiff should have been nonsuited; since now that the parties to a suit may be examined, and the plaintiff in this case would be able to give evidence in his own behalf, the case is in substance the same as if a new witness had been discovered. I think, therefore, that there ought to be a new trial on payment of costs, but as the court think differently on that point, the rule must be discharged. At first I was inclined to doubt whether this was the case of a privileged communication, but I am now satisfied I was wrong. This book would never have been in the hands of the attorney, except for the purpose of his preparing a case for counsel. The document was the property of the client, in the same way that deeds deposited with the attorney by the client do not cease to be the property of the latter. The attorney in this case would not have been possessed of them but for the confidence reposed in him by the client, that the communication was necessary for the purpose of being laid before counsel. The rule must be discharged, but I am very sorry there cannot be a new trial, as I think there ought to have been, on payment of costs, since the merits of the case have not been tried at all.

MARTIN, B. I concur with my brother Platt in thinking that there ought to be a new trial on payment of costs. Where a piece of evidence is objected to, a judge is bound, in the same manner as a jury, to try any preliminary question of fact upon which the objection depends. A preliminary question of this kind arose in *Wright v. Doe d. Tatham*, 7 Ad. & E. 313; s. c. 7 Law J. Rep. (N. S.) Exch. 340, and was decided by the judge, and it was held that as to this point his decision was conclusive. It is true that the erroneous decision of a judge as to a preliminary matter of fact may be reviewed by a court of error, because, although it is in one point of view a decision on a matter of fact, it is in another sense a determination of a question of law. Where an attorney called as a witness to produce a document, declines to do so on the ground of professional confidence, the other side may call witnesses to disprove the allegation of professional confidence, and the judge may try the question of fact. Here, the judge thought the case was one of professional confidence. He considered that the client had sent the book to the plaintiff for the purpose of a case being prepared for counsel. The client might be in error in thinking the communication necessary to be laid before counsel, but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged. In the present case, the payment of interest could not be proved by the attorney. At the same time I should like to see the rule made absolute, on payment of costs.

Rule discharged.

Frith v. Wollaston.

FRITH and others v. WOLLASTON.¹

January 19, 1852.

Colonial Judgment, Action on — Colonial Insolvency — Suspension of Execution — Discharge.

To an action on a judgment at the Cape of Good Hope, the defendant pleaded that by an ordinance in that country relating to insolvents, it was enacted that the court might on the petition of an insolvent place his estate under sequestration, and that further execution of any judgment against him or his estate for any debt, should, after lodging the order for sequestration, be stayed during the pendency of such sequestration, and that all actions pending against any insolvent for any debt provable against his estate should upon any order being made for sequestration, be stayed. The declaration then stated the petition of the defendant, the surrender of his estate, its being placed under sequestration, and that the estate was distributed, and upon such distribution the plaintiffs received a dividend of 1s. 6d. in the pound on the amount of the judgment debt in the declaration:—

Held, on demurrer, that the plea was bad, as it merely showed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent.

DEBT on a judgment recovered in the Supreme Court of the Cape of Good Hope.

Plea — that by an ordinance of the governor of the Cape of Good Hope for regulating the collection and distribution of insolvent estates within the colony, it was enacted that it should be lawful on the petition of an insolvent for the court to accept his petition to place his estate under sequestration, and that further execution of any judgment against any insolvent or his estate for the amount of any debt should, after the lodging of an order for sequestration, be stayed during the pendency of such sequestration, and that all actions pending against any insolvent for any debt or demand provable against his estate, and all proceedings therein should, upon any order being made for sequestration of such estate in virtue thereof be stayed. That a trustee should be appointed for the collection, administration, and distribution of his estate. That creditors should prove their debts; that the sequestration when made should divest the insolvent of his estate real and personal, and vest it in the Master of the Court; that a decree confirming the appointment of a trustee should divest the said master of the estate of the insolvent and vest it in the trustee; that the trustee should form a plan for the distribution of the estate, and on confirmation thereof distribute the same. The declaration then stated that the defendant petitioned the Supreme Court¹ setting forth that he was an insolvent and desirous of surrendering his estate; that his estate was surrendered and placed under sequestration; that a trustee was appointed and confirmed; that the trustee laid before the master a plan for the distribution of the estate, which was confirmed by the court. The declaration then alleged that the trustee distributed the defendant's estate, and upon such distribution the plaintiffs received a dividend of 1s. 6d. in the pound on the amount of the judgment debt in the declaration.

¹ 21 Law J. Rep. (N. S.) Exch. 108.

Frick v. Wollaston.

Demurrer: the ground being, that the alleged suspension was no bar to an action in this country.

Willes, for the plaintiffs. The plea affords no answer to the action. It merely shows that by the law of the Cape of Good Hope, execution was stayed.

[PARKE, B. The plea does not show that there is any satisfaction and discharge of the person and estate of the debtor, but merely that the proceedings are suspended.]

The object merely is to protect the estate in the hands of the authorities of the Insolvent Court. In *Snook v. Mattock*, 5 Ad. & E. 239; s. c. 5 Law J. Rep. (N. S.) K. B. 206, it was held that on a *scire facias* to revive a judgment against an executor, it is not a good plea that a writ of error is dependent on the judgment. The plea does not show that an action will not lie on the judgment.

Lush, contra. The plea is good. The defence set up is available by the laws of the Cape of Good Hope, and, therefore, will be recognized in this country. All proceedings on the judgment are stayed during the pendency of the execution.

[MARTIN, B. The application to stay proceedings ought to be made to the court, and not by pleading.]

PARKE, B. The law of the Cape does not say that the contract entered into with the debtor shall be void, or that it shall be set up as a defence to an action.]

The law was passed with a view to prevent any action from being brought upon judgments during the pendency of the sequestration. The plea shows that *pro tanto* there is a release and discharge of the debt.

Willes, in reply.

POLLOCK, C. B. The plaintiffs are entitled to judgment. This is an action on a judgment at the Cape of Good Hope, and the plea merely amounts to this: that the right of having execution is suspended for a certain time. If we were to give judgment for the defendant, and if to-morrow the suspension should be removed, the defendant would plead that he had obtained judgment, and there would be an end to the plaintiffs' right to recover.

PARKE, B. I am of the same opinion. Whatever affects the contract itself might be made use of as a defence in answer to an action upon the contract. This judgment, which has been obtained in a foreign country, is binding upon the parties to it, and any matter which would afford a good defence in the country where the judgment was obtained would be equally available as such in this country. Now, although this law of the Cape of Good Hope creates a temporary suspension of the execution upon a judgment, it does not say that the debt itself shall be considered as satisfied; and, therefore, it does not take away the party's remedy on his judgment. Neither

Andrews v. Eaton.

does the law say that the remedy which the creditor may have upon the judgment against his debtor, by proceeding upon it against his real or personal estate in a foreign country, is gone. At all events, it is clear that the law of the Cape of Good Hope cannot be taken to refer to the debtor's real estate abroad, which, being extra-territorial, is also out of the jurisdiction of that Court where the judgment was obtained.

ALDERSON, B., concurred.

MARTIN, B. I am of the same opinion. The plea is no answer whatever to this action. At the most, the execution is to be stayed only during the pendency of the sequestration; the plea, therefore, ought to have averred that at the time of action brought the sequestration was pending. This it does not do.

Judgment for the plaintiffs.

ANDREWS v. EATON.¹

January 30, 1852.

Arbitration—3 & 4 Will. 4, c. 42, s. 39—Enlargement of Time for making the Award.

A cause was referred to arbitration in 1846, after which both parties having delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award beyond Easter term, 1850, the court refused, under the 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time to Michaelmas term, 1852, the defendant refusing his consent to such enlargement.

THIS was a rule calling on the defendant to show cause why the time for the arbitrator in this case to make his award should not be enlarged to the first day of next Michaelmas term, or why the plaintiff should not be at liberty to sign judgment on the verdict entered for him, or why he should not be at liberty to proceed to try the cause, unless the defendant would consent to such enlargement. It appeared that the cause had been referred in January, 1846, and that the reference was proceeded with on the 9th, 10th, and 11th of December in that year. On the 17th of December, 1848, an appointment was obtained by the defendant for proceeding with the reference, but it being inconvenient for the plaintiff to attend the appointment, the same went off. On the part of the defendant, it appeared that, owing to the death of three of his witnesses, and the advanced age of others, he would be under great difficulties in proceeding with the reference. The arbitrator had not enlarged the time for making his award beyond Easter term, 1850.

¹ 21 Law J. Rep. (N. S.) Exch. 110.

Bromage v. Vaughan.

Hance, for the defendant, showed cause. It appears from the affidavits that the plaintiff has abandoned the reference. Besides, the lapse of time has been too great to entitle the court to enlarge the time further. It would seem from the case of *Lambert v. Hutchinson*, 2 Man. & G. 858; s. c. 10 Law J. Rep. (N. S.) C. P. 213, that where an arbitrator, under an order of nisi prius, has power to enlarge the time for making his award, and omits to exercise that power, the 3 & 4 Will. 4, c. 42, s. 39, does not enable the court or a judge to enlarge the time. In that case, Tindall, C. J., says, "So long a time has elapsed since any step has been taken under the order of reference in this case, that even if the court has power to interfere, I do not think it would exercise a sound discretion in doing so. I have a strong opinion upon the statute, but upon that point it is unnecessary to give any decision."

G. T. White, for the plaintiff, in support of the rule. Both parties have been guilty of delay, and both are equally in default. In *Lambert v. Hutchinson* there had been a change of parties, for the defendant had married subsequently to the last meeting before the arbitrator. The 3 & 4 Will. 4, c. 42, s. 39 enables the court to enlarge the time in this case.

[*POLLOCK*, C. B. It was never intended by that act that the court should exercise the sort of power the plaintiff wishes us to exercise.

PARKE, B. The ordinary cases in which we interpose are those in which the arbitrator has accidentally allowed the time of enlargement to slip.]

The court will allow the plaintiff to sign judgment.

[*POLLOCK*, C. B. No; the court will set aside the verdict, and allow the cause to be tried.]

Hance then intimated that under all the circumstances, the defendant would consent to the enlargement of the time.

Per Curiam.¹ Then let the rule be absolute for the enlargement; the costs to be costs in the cause. *Rule absolute accordingly.*

BROMAGE & another v. VAUGHAN, Clerk.²

January 30, 1852.

Writ of Sequestration — Fi. Fa. — Return — Irregularity — Time for setting aside.

Judgment having been obtained against the defendant, a beneficed clergyman in the county of Brecon, a writ of sequestration was issued against him on the 17th of August, at which

¹ *POLLOCK*, C. B., *PARKE*, B., *ALDERSON*, B., and *PLATT*, B.

² 21 Law J. Rep. (N. S.) Exch. 111.

Bromage v. Vaughan.

time no writ of *fi. fa.* had been issued. On the 9th of October a *fi. fa.* against him was returned by the sheriff of Bristol *nulla bona*, but not that the defendant was a beneficed clerk. The rule to set aside the writ of sequestration was moved for on the 22d of November:—

Held, that the writ of sequestration was irregular, and that the application to set it aside was made in sufficient time.

THIS was a rule, calling on the plaintiffs to show cause why the writ of sequestration issued in this action should not be set aside. The defendant was a vicar holding two vicarages in the county of Brecon, and an action having been brought against him, and judgment signed on the 6th of August last, a writ of sequestration was issued and put in force on the 17th of that month. At the time of the above writ being so put in force, no *fi. fa.* had been issued to or returned by the sheriff of Brecon, or by any other sheriff, but on the 9th of October a writ of *fi. fa.* at the suit of the plaintiffs against the defendant, was returned by the London deputy for the city of Bristol "*nulla bona*" only, but not that the defendant was a beneficed clerk. The rule to set aside the writ of sequestration was moved for on the 22d of November last.

Willes, for the plaintiffs, showed cause. The objection made by the defendant in this case is, that the writ of *fi. fa.* on which the sequestration is grounded, ought to have been issued to the sheriff of Brecon, and ought to have been returned by him. The objection, however, is merely formal, and the proceeding amounts to an irregularity only; and, therefore, the defendant ought to have come to this court at an earlier period. Secondly, a return of *nulla bona*, and that the defendant was a beneficed clerk, is a mere matter of form, and may be made by the sheriff of a foreign county. It was not necessary to issue the *fi. fa.* into the county of Brecon. The return by the sheriff of Bristol is good. If a party is injured by a false return, he may bring an action on the case against the sheriff or bishop who makes the return. *Pickard v. Paiton*, Sid. 276. *The King v. Powell*, 1 Mee. & W. 321; s. c. 5 Law J. Rep. (N. S.) Exch. 170, although not exactly in point, yet tends to show that all that is required in a case like the present is, that some particular bishop should be designated; but that it is immaterial to what bishop the writ is directed. The next objection is, that no writ of *fi. fa.* had been issued into Bristol previously to the 17th of August, the date of the sequestration. The answer, however, to that objection is, first, that the application is made too late; and, secondly, that the court will amend the writ. 2 Chit. Arch. 1135, as it is merely the case of an irregularity. He referred to *Warne v. Haddon*, 9 Dowl. P. C. 960, and *Crowther v. Wheat*, 8 Mod. 243.

Lush, contra, for the defendant. The writ of sequestration is a nullity. A party is not entitled to issue such a writ until he has first exhausted the temporal goods of the debtor. The writ ought to have been issued into the county where the benefice is situated, as a clerk is presumed to reside on his benefice. Where a judgment has been

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

signed more than a year, and an execution issues thereon without any *sci. fa.* to revive the judgment, a writ of *ca. sa.* founded thereon is a nullity, and the debtor may apply for his discharge at any time. *Mortimer v. Piggott*, 2 Dowl. P. C. 615, and *Blanchenay v. Burt*, 4 Q. B. Rep. 707; s. c. 12 Law J. Rep. (N. S.) Q. B. 291. This then being the case of a nullity, or, at the least, of an irregularity, the defendant is not too late in his application to this court. He was not to apply to a judge at chambers.

[PARKE, B. The application was made in time.]
(He was then stopped by the court.)

POLLOCK, C. B. The rule must be absolute. This being the case of an irregularity, the question is, whether the defendant came to this court in time. I think he did. He was not bound in a case of this description to go to a judge at chambers.

PARKE, B. I am of the same opinion. The sequestration is irregular, and then the question is, whether the defendant applies to this court in time, and I think he does. No change in the plaintiff's position has arisen from the defendant not applying earlier. If he had applied to a judge at chambers, in all probability the judge would have stayed the proceedings to give him an opportunity of coming to this court. There has been no loss to the plaintiffs, and no alteration in their circumstances by reason of the defendant not having applied to a judge at chambers.

ALDERSON, B. The writ of sequestration in this case is irregular, and therefore we need not determine the precise character of the irregularity, as to which indeed I entertain some doubt. I think, however, there is an irregularity if the sheriff does not make a return of *clericus beneficiatus*, and it may perhaps be an irregularity if there is no return made by the sheriff of the county in which the clerk resides. But as to that point I entertain some doubt. An irregularity, however, does exist, and has not been waived on the part of the defendant.

PLATT, B., concurred.

Rule absolute.

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY v. THE EAST LANCASHIRE RAILWAY COMPANY.¹

December 2, 1851.

Railway Company—Tolls—Construction of Agreement.

In November, 1843, an agreement was made between "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway" and "The Bury and Rossendale Railway Company," as follows:—"It is hereby mutually agreed between the

¹ 15 Jur. 1480; 21 Law J. Rep. (N. S.) Exch. 62.

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

parties, &c., — First, that they will mutually concur, co-operate, and aid, at the expense of the Bury and Rossendale Company, in obtaining an act of parliament, in the ensuing session, for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall. Secondly, that the Bury and Rossendale Railway Company shall have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine. Thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines, or any portions thereof,) between Salford and Rawtenstall, or any points intermediate to these, shall be carried on, as it respects engine power and carriages, clerks, porters, and all other expenses, (except the maintenance of the Manchester and Bolton Railway,) at the costs and charge of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company for the use of their railway, and in respect to the traffic herein specified, a *pro rata* proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from said traffic, with no other deduction from the same than that hereinafter mentioned; and with this proviso, that nothing herein contained nor elsewhere provided shall authorize the Manchester and Bolton Railway Company to receive for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway in Salford; nevertheless the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway for a length of two miles, at the least. Fourthly, that previous to such apportionment of the gross rates, tolls, and proceeds, referred to in clause 3, the Bury and Rossendale Railway Company shall be entitled to deduct so much of the passenger duty as shall be paid by them; and afterwards further to deduct from the proceeds of all such of the said traffic as shall have been conveyed in their carriages, wagons, and trucks, and by power provided at their expense, the further sum of 12½ per cent, and no more, from the proceeds arising from passenger traffic, including gentlemen's carriages, horses, and parcels, and 30 per cent, and no more, from the proceeds arising from merchandise or coal traffic, including stone." Subsequent to the execution of this agreement, the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway was incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company;" and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," was extended to some other places, and then became "The East Lancashire Railway Company;" and by divers subsequent acts of parliament certain other railways were incorporated with it, so as to form an extensive line of railways altogether. A special verdict having found that the length of the Manchester and Bolton Railway from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway, at Clifton, is four miles, and no more: —

Held, first, that on the true construction of the above agreement, the Lancashire and Yorkshire Railway Company were not entitled to charge the East Lancashire Railway Company that proportion for the whole amount received as tolls which that whole distance of two miles to be charged for on their part bears to the whole distance travelled on the line of the East Lancashire Company alone; but that the rate per mile for the charge was first to be settled by the relative distances actually travelled on each, and when so settled a distance of two miles was to be paid for at that rate.

Secondly, that the agreement itself did not extend beyond the traffic along the Bury and Rossendale Railway alone to the traffic along the whole railway of the East Lancashire Railway Company.

THIS was an action of debt for tolls and duties, payable from the defendants to the plaintiffs, in respect of the passage and conveyance of divers steam-engines, trucks, carriages, and wagons, and the carriage of persons, goods, chattels, and merchandise, along a certain railway of the plaintiffs. The defendants paid a certain sum into court in satisfaction of a portion of the plaintiffs' demand; and pleaded as to the residue never indebted, and payment. At the trial, a special verdict was taken, which found the following facts: —

By an act of parliament of the 6 & 7 Will 4, for making a railway from Manchester to Leeds, certain persons were incorporated by the

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

name of "The Manchester and Leeds Railway Company;" which act was altered and amended by several subsequent ones; and by the 10 & 11 Vict. c. 163, the name of the company was changed to that of "The Lancashire and Yorkshire Railway Company," the plaintiffs in this action. By the 7 & 8 Vict. c. 60, for making a railway from the Manchester and Bolton Railway, in the parish of Eccles, to the parish of Whalley, all in the county palatine of Lancaster, certain persons were incorporated by the name of "The Manchester, Bury, and Rosendale Railway Company;" which name was by the 8 & 9 Vict. c. 101, changed to "The East Lancashire Railway Company," the now defendants. By the 1 & 2 Will. 4, c. 60, intituled, "An Act to enable the Company of Proprietors of the Canal Navigation from Manchester to Bolton and to Bury to make a Railway from Manchester to Bolton and to Bury, in the County Palatine of Lancaster, upon or near the Line of that Canal Navigation, and to make a collateral Branch to communicate therewith, afterwards known and cited in Acts of Parliament by the short title of 'The Manchester, Bolton, and Bury Canal and Railway Act, 1831,'" certain persons were incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway;" and were thereby authorized, *inter alia*, to make a railway or railways, with proper works and conveniences connected therewith, for the passage of wagons and other carriages properly constructed, commencing from the river Irwell, in the township of Salford, in the county aforesaid, and extending and passing through Clifton and other places in the said county, and terminating in the town of Bolton, in that county; and were thereby authorized to receive certain rates, tolls, and duties, for and in respect of passengers and goods passing over the last-mentioned railway or any part thereof, and in case of refusal or neglect of payment thereof, to sue for and recover the same by an action of debt in any of her Majesty's courts of record. This statute was amended by the stat. 2 Will. 4, intituled, "An Act to enable the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway to alter some Parts of the said Canal Navigation, to alter and amend the Line of the said Railway, to make further collateral Branches thereto, and for amending the Powers and Provisions of the Act relating to the said Canal and Railway," and also by two other acts passed in the 5 Will. 4 and 1 Vict. respectively. The railway thus authorized to be constructed from the river Irwell through Clifton to Bolton, with divers works connected therewith, was accordingly constructed by the company so incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway," and which last-mentioned railway was commonly called and known and mentioned in divers acts of parliament by the name of "The Manchester and Bolton Railway;" and amongst other works so authorized was constructed a station at the commencement of that railway near the river Irwell, in the township of Salford, near Manchester, and also certain warehouses, buildings, and conveniences, connected therewith at Salford. Afterwards, on the 14th November, 1843, the following memorandum

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

of agreement was made between J. R. B. on behalf of the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and signed by him on behalf of that company; and J. G., the younger, on behalf of certain persons then intending to form a company proposed to be called "The Bury and Rossendale Railway Company," but who were afterwards incorporated by the name of "The Manchester, Bury, and Rossendale Railway Company," and subsequently by the name of "The East Lancashire Railway Company," and which memorandum of agreement was duly signed by him on their behalf:—"Memorandum of agreement. It is hereby mutually agreed between the parties undersigned, for themselves, and on behalf of the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and the Bury and Rossendale Railway Company: First, that they will mutually concur, co-operate, and aid, at the expense of the Bury and Rossendale Company, in obtaining an act of parliament, in the ensuing session, for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall. Secondly, that the Bury and Rossendale Railway Company shall have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine. Thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portion thereof,) between Salford and Rawtenstall, or any points intermediate to these, shall be carried on, as it respects engine power and carriages, clerks, porters, and all other expenses, (except the maintenance of the Manchester and Bolton Railway,) at the costs and charge of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company for the use of their railway, and in respect to the traffic herein specified, a *pro rata* proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic, with no other deduction from the same than that hereinafter mentioned; and with this proviso, that nothing herein contained, nor elsewhere provided, shall authorize the Manchester and Bolton Railway Company to receive for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway in Salford; nevertheless, the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway for a length of two miles, at the least. Fourthly, that previous to such apportionment of the gross rates, tolls, and proceeds referred to in clause 3, the Bury and Rossendale Railway Company shall be entitled to deduct so much of the passenger duty as shall be paid by them; and afterwards further to deduct from the proceeds of all such of the said traffic as shall have been conveyed

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

in their carriages, wagons, and trucks, and by power provided at their expense, the further sum of 12½ per cent., and no more, from the proceeds arising from passenger traffic, including gentlemen's carriages, horses, and parcels, and 30 per cent., and no more, from the proceeds arising from merchandise or coal traffic, including stone. Fifthly, that the Manchester and Bolton Railway Company will, if required, subscribe 75,000*l.*, by taking shares to this amount, towards the expense of constructing the Bury and Rossendale Railway. Sixthly, that the Manchester and Bolton Railway Company shall be represented in the Bury and Rossendale Railway Company, as to the number of directors and votes at meetings of proprietors, in *pro rata* proportion with the amount of their subscription to the capital of the company." The special verdict then found that the parties making and signing this agreement had power from their respective companies to do so on their behalf; and that the agreement was afterwards ratified by a certain deed or agreement bearing date the 22d January, 1844, and sealed with the common seal of the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and signed and sealed by the said J. G. on behalf of the directors of the Manchester, Bury, and Rossendale Railway Company afterwards incorporated as aforesaid. By the 7 & 8 Vict. c. 60, already mentioned, the Manchester, Bury, and Rossendale Company were authorized to make a railway commencing by a junction with the Manchester and Bolton Railway, in the township of Clifton, in the parish of Eccles, and passing through Clifton, Rossendale, and other places therein mentioned, all in the county palatine of Lancaster, and terminating in the township of Lower Booths, in the parish of Whalley, in the said county; and so soon as the junction between the railway thereby authorized to be made and the Manchester and Bolton Railway at Clifton shall be effected, and the railway opened to passenger traffic to Bury, the company should at times be entitled to use so much of the Manchester and Bolton Railway as lies between the point of junction and the present terminus of the same railway in Salford, with their own engines, coaches, wagons, and other carriages for the conveyance by them of all such passengers, cattle, goods, wares, merchandise, articles, matters, and things of every description, and of such only as should have first *bond fide* passed the railway thereby authorized to be made from, or should afterwards *bond fide* pass along the last-mentioned railway to, any of the usual and accustomed stations or stopping-places therein; subject only to the payment by way of toll to the said company of proprietors of such charges, &c., as might have been or hereafter might be determined by mutual agreement between the two companies; and also for the purpose of such traffic only to use the station at Salford and the conveniences connected therewith, but not so as to impede the traffic of the said company of proprietors; and all the powers and remedies for the recovery of tolls, rates, and duties, under the existing acts of the said company of proprietors should be applicable to the recovery from the company thereby incorporated of the payment due in respect of the above traffic.

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

The verdict then set out some other parts of that statute: and found as a fact that the length of the Manchester and Bolton Railway from the commencement thereof from the river Irwell, near Manchester, that is, at the station at Salford, to the point where the said junction is made therewith by the Manchester, Bury, and Rossendale Railway at Clifton, is four miles and no more: and that the entire length of that which was the Manchester, Bury, and Rossendale Railway, is fourteen miles and no more, and that the length of so much thereof as extends from the junction at Clifton to Bury, is six miles and no more. By the 8 & 9 Vict. c. 35, certain persons were incorporated by the name of "The Blackburn, Burnley, Accrington, and Colne Extension Railway Company;" and were thereby authorized to make and construct a railway and works connected therewith, commencing by a junction with the Manchester, Bury, and Rossendale Railway, in the township of Tottington Higher End, in the parish of Bury, and passing through divers places therein mentioned to Accrington, in the said county; and thence by means of two diverging lines of railway; the one passing through divers places therein mentioned and terminating at or near Blackburn, either by a distinct terminus or by a junction with the then intended Blackburn and Preston Railway; and the other of such diverging lines passing through Burnley and other places therein named and terminating at or near Colne, in the said county; and the last-mentioned company were empowered to demise or lease the railway and works thereby authorized to the Manchester, Bury, and Rossendale Railway Company for any time which might be mutually agreed upon, and the Manchester, Bury, and Rossendale Railway Company were also empowered if they should think fit to purchase the undertaking thereby authorized; and the company thereby incorporated were authorized to sell the undertaking, either before or after completion, upon such terms as should be mutually agreed upon, and to convey the same to the Manchester, Bury, and Rossendale Railway Company; and upon such conveyance being made the undertaking should become and form part of the undertaking of the Manchester, Bury, and Rossendale Railway; and the said undertakings when so united should be called "The East Lancashire Railway;" and all the rights, privileges, and authorities of the company incorporated thereby should thereupon vest in the Manchester, Bury, and Rossendale Railway Company. The Manchester, Bury, and Rossendale Railway Company having become the East Lancashire Railway Company, by virtue of the 8 & 9 Vict.; by indenture of the 4th August, 1845, between the Blackburn, Burnley, Accrington, and Colne Extension Railway Company and the East Lancashire Railway Company, and sealed with their common seals, the undertaking and works of the Blackburn, Burnley, Accrington, and Colne Extension Railway Company were duly conveyed to and became vested in the East Lancashire Railway Company, according to the provisions of the statute. By agreement under seal of the 19th March, 1846, between the Manchester, Bolton, and Bury Canal Navigation and Railway Company of the first part, the Manchester and Leeds Railway Company of the second part, and the East Lanca-

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

shire Railway Company of the third part, it was provided that the agreement of the 22d January, 1844, and the provisions of the statute affecting the Bolton Company, should be confirmed by an amalgamation act of Parliament, to be obtained if possible; subject to this alteration, that the East Lancashire Company, in respect of their traffic passing from the Manchester and Bolton line to the Victoria station or elsewhere, should be liable to pay to the Bolton or amalgamated company for the use of the Manchester and Bolton line between Clifton and Salford the same sums only by way of toll as were set forth in the agreement of the 22d January, 1844. The Victoria station here mentioned is a station partly belonging to the Manchester and Leeds Railway Company, afterwards the Lancashire and Yorkshire Railway Company, and partly to the London and Northwestern Railway Company, and is connected with the station of the Manchester and Bolton Railway at Salford by a short railway branch of the length of 1290 yards, being part of one of the lines of railway of the London and Northwestern Railway Company; by means of which passengers and goods passing on the Manchester and Bolton Railway may be forwarded to the Victoria station, and from thence by other lines of railway belonging to the Manchester and Leeds Railway Company, &c.; and passengers and goods coming from such other lines of railway may be forwarded to and along the Manchester and Bolton Railway, which became vested in the Manchester and Leeds Railway Company, &c. By the 9 & 10 Vict. c. 378, the Manchester, Bolton, and Bury Canal Navigation and Railway, and all its real and personal estate and effects, rights, privileges, powers, and authorities, were vested in the Manchester and Leeds Railway, now called "The Lancashire and Yorkshire Railway Company;" and it was thereby enacted that the Manchester and Leeds Railway Company might receive the rates, tolls, and charges therein mentioned for and in respect of the passing of passengers, and goods, and carriages over the Manchester and Bolton Railway; with a proviso that with respect to such passing over that railway for a less distance than six miles the Manchester and Leeds Railway Company might demand tolls as for six miles. That statute likewise confirmed the agreements of the 22d January, 1844, and the 19th March, 1846, unless where inconsistent with its provisions; and all the powers, authorities, rights, privileges, provisions, directions, matters, and things applicable to the Manchester, Bolton, and Bury Canal Navigation and Railway, contained in any acts relating to the East Lancashire Railway Company, save only as altered by itself, should be exercised by and be applicable to the Manchester and Leeds Railway Company; provided that nothing contained in that act should prejudice, &c. any of the rights, &c. vested in the East Lancashire Railway Company by virtue of the last-named acts of parliament relating to the use of the Manchester, Bolton, and Bury Railway and the stations, warehouses, buildings, and conveniences connected therewith. By the 7 & 8 Vict. c. 34, certain persons were incorporated by the name of "The Blackburn and Preston Railway Company," for the purpose of making a railway from Blackburn, in Lancashire, and terminating by a junction with

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

the North Union Railways; by the 8 & 9 Vict. c. 103, certain alterations were allowed to be made in that line; and by the 9 & 10 Vict. c. 266, the company were empowered to make certain branch railways. By the 9 & 10 Vict. c. 302, the Blackburn and Preston Railway Company was consolidated with the East Lancashire Railway Company; with the proviso that the tolls, rates, and charges to be taken by the company in respect of the passage and conveyance respectively of all goods, articles, matters, and things upon the said railway and the Manchester and Bolton Railway, between its point of junction at Clifton and its then present terminus at Salford, should be computed at such rates as if the railways thereby amalgamated and the Manchester and Bolton Railway formed one line of railway. By "The Liverpool, Ormskirk, and Preston Railway Act, 1846," certain persons were incorporated by the name of "The Liverpool, Ormskirk, and Preston Railway Company;" and were authorized to construct certain railways therein mentioned, and particularly a certain railway from a place near Liverpool to a place near Preston, and to connect the same with the Blackburn and Preston Railway, and were authorized to demise or lease their undertaking to the East Lancashire Company, or to sell and convey it to them, &c.; and it was accordingly so conveyed by indenture of the 5th October, 1846. By the 10 & 11 Vict. c. 289, the East Lancashire Railway Company were empowered to extend their railway into Preston. By the 9 & 10 Vict. c. 390, certain persons were incorporated by the name of "The West Riding Union Railways Company," and authorized to make certain railways communicating with the Manchester and Leeds Railway, and to receive for the use thereof certain rates, tolls, and charges for the passage of passengers and goods over and upon the said railways; with a proviso that with respect to the passing of the same over the said railways for less distance than six miles the company might demand tolls as for six miles; and that from and after the undertaking thereby authorized should have been united to and amalgamated with the Manchester and Leeds Railway Company, the maximum rates of charge for the conveyance of passengers, &c., including the tolls for the use of the said railways, the locomotive power, and every other expense incidental to such conveyance, except government duty, should be applicable to the Manchester and Leeds Railway, and to all other railways which then were or might thereafter by virtue of any act or acts of parliament to be passed in that session be or become united to or amalgamated with the Manchester and Leeds Railway Company; with a proviso that nothing in that act contained should authorize the Manchester and Leeds Railway Company to charge any higher rate upon any railway then amalgamated with or united to, or which might by virtue of any act or acts passed during the then present session of parliament be amalgamated with or united to the Manchester and Leeds Railway, then the maximum rate allowed by the respective acts severally applicable to such railway previous to such amalgamation, &c.; and by the last-mentioned act the West Riding Union Railways Company thereby incorporated was thereby united to and incorporated with the Man-

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

chester and Leeds Railway Company, afterwards changed by the 10 & 11 Vict. c. 163, to "The Lancashire and Yorkshire Railway Company." The special verdict then proceeded to find that the Manchester, Bury, and Rossendale Railway Company, until its change of name, and subsequently as the East Lancashire Company, used so much of the railway, formerly the Manchester and Bolton Railway, as lies between the point of junction and the terminus of that railway in Salford; that between Clifton and Salford were two other stations, the Pendleton, and the Windsor Bridge; and that the length of the railway of the defendants from the commencement at the junction at Clifton to New Hall Hey Bridge, is fourteen miles; and that the entire length of the defendants' railway is seventy-two miles; and that between the 29th April and the 1st June, 1849, divers steam-engines, trucks, carriages, and wagons of the defendants, with passengers, goods, chattels, and merchandise, did pass over that part of the railway of the plaintiffs, formerly called the Manchester and Bolton Railway, which lies between Salford and the junction at Clifton, to and from the usual and accustomed stations or stopping-places on the said railway of the defendants; and that some of such steam-engines, &c., came from, and other part thereof passed on to, stations and places on that part of the railway of the defendants which lies beyond the line of that portion of the defendants' railway which was formerly called the Manchester, Bury, and Rossendale Railway; that such passing as aforesaid was by the sufferance and permission of the plaintiffs; and that payment of the tolls and duties claimed by the plaintiffs in this action was duly claimed on their behalf.

This special verdict was argued by

Tomlinson, for the plaintiffs, and

H. Hill, for the defendants.

The nature of the questions and arguments fully appear in the judgment.

Our. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. The questions raised upon the argument of the special verdict in this case were two: first, as to the construction of a certain agreement of the 14th November, 1843; made between "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway," and "The Bury and Rossendale Railway Company;" and secondly, whether this agreement extended beyond the traffic along the Bury and Rossendale Railway alone to the traffic along the whole railway of the present defendants. The agreement was as follows:—(His Lordship here read the agreement.)

At the time of this agreement the contracting parties were, as is mentioned therein, "The Manchester, Bolton, and Bury Canal Navigation and Railway Company," and "The Bury and Rossendale

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

Railway Company." The former of these companies was afterwards, by stat. 9 & 10 Vict. c. 378, incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company," the present plaintiffs. The latter company became "The Manchester, Bury, and Rossendale Company," and was extended to Blackburn, Burnley, Accrington, and Colne, and then became "The East Lancashire Railway Company;" and by divers subsequent acts of Parliament certain other railways were incorporated with it—viz. the Blackburn and Preston Railway, and the Liverpool, Ormskirk, and Preston Railway—so as to form an extensive line of railways altogether.

The first question raised by the special verdict is, what is the proper rate of charge for carriages and passengers traversing the whole or any part of the space between the point of junction and the Salford station, which is found by special verdict to be of the length of four miles, and no more? As to the rate of charges for passing these four miles between Clifton and Salford, Mr. Tomlinson for the plaintiffs contended, that the plaintiffs were entitled to charge that proportion for the whole amount received as tolls which the whole distance, viz., two miles, to be charged for on this part bears to the whole distance travelled on the defendants' line alone. Thus on a journey from Bury to Salford, ten miles altogether, composed of six miles from Bury to the junction and four from the junction to Salford, of which only two would be charged for, they would be entitled to the proportion of tenpence, the toll for the whole journey, which two bears to eight miles, the aggregate of six miles on the defendants' and two on the plaintiffs' railway, or one-fourth, viz., 2½d.

Hill on the other hand argued that in that case it was to be in the same proportion which two bears to ten; the proportion of two miles to the whole distance travelled, or 2d.; and this latter we hold to be the true construction.

The defendants are to pay the plaintiffs a *pro rata* proportion according to the distance travelled over each railway, but the plaintiffs are not to receive for the use of their railway for a greater distance than half the length between the point of junction and the terminus, nor for a less distance than two miles. Now as it turns out that the whole distance is four miles, the limits as to the maximum and minimum charge coincide; the rate per mile therefore for the charge is first to be settled by the relative distances actually travelled on each; and when so settled a distance of two miles is to be paid for at that rate. This is the plain and literal construction of the agreement, and we think the true one.

Then we arrive at the second question—to what railway does the agreement extend?

It appears quite clear, that at the time when the agreement was made the question admitted of no reasonable doubt. The traffic of the Manchester, Bury, and Rossendale line could alone have been then contemplated—for there was no other—and the nature of the agreement itself strongly tends to show that it must have been so limited. For it was an agreement to give accommodation at the

The Lancashire and Yorkshire Railway Co. v. The East Lancashire Railway Co.

Salford station to the traffic of the projected railway. Now that accommodation is of necessity limited by the station itself. It is one thing to accommodate traffic arising on a railway of fourteen miles, and quite another thing to do the same for a more extended, and indeed, as here contended, for an indefinitely extended, railway. Unless, therefore, we find an express extension of this agreement to the traffic of the present railways, we ought not to hold it as so extended. It is clear to us that the accommodation given must have been limited, and unless we stop at the railway existing we can find no limit whatever.

Now, looking to the different acts of Parliament, whereby the original Manchester, Bury, and Rossendale Railway has been extended and incorporated with others, till at length it has become the aggregate, now called "The East Lancashire Railway," we do not find provisions extending, and at the same time limiting this accommodation. We think that these provisions amount to no more than this, that the agreement has been made applicable to those other railways, although they were not parties who made the original contract, but that, in its terms, it remains as limited as before. They are entitled to all its provisions and benefits; quite as much as if they had been the original contracting parties to it. But the contract itself remains as before. If they wish the traffic, beginning on these lines, and passing over the original Manchester, Bury, and Rossendale Railway, and from it over the railway extending from the point of junction to the Salford station, or over any part thereof, to pass at the rates provided for by this agreement, they cannot do so without a fresh and additional agreement to that effect. It is a very different thing to say that any traffic coming by coach or wagon or on foot to the original railway was contemplated, for that of necessity has the limit arising out of the very nature of such a mode of access; but the extension of the railway itself would, we think, clearly not be within the original agreement, for such additional traffic is really quite unlimited in its nature and extent, and it is clear that the agreement was for a limited accommodation only.

The second question will therefore be decided against the defendants; and the result will be a verdict for the plaintiffs, inasmuch as the money paid into court will not be sufficient unless both questions are determined in favor of the defendants. The amount we must leave the parties themselves to arrange.

Judgment for the plaintiffs.

Gavin v. Allan.

GAVIN v. ALLAN¹.

January 22, 1852.

Judgment as in Case of Nonsuit—Insolvent—Stet Processus.

After issue joined in an action the plaintiff petitioned the Insolvent Debtors Court, and was discharged as an insolvent debtor, having entered in his schedule the debt which formed the subject of the pending action; but it did not appear whether the assignees were willing to proceed with it or not:—

Held, that the defendant was not entitled to judgment as in case of a nonsuit; but that a *stet processus* might be entered by the joint consent of him and the plaintiff.

This was a rule for judgment as in case of a nonsuit. After issue joined, the plaintiff petitioned the Insolvent Debtors Court, and was discharged as an insolvent debtor. He had entered in his schedule the debt which formed the subject of the present action; but it did not appear from the affidavits on either side, whether the assignees were willing to proceed with it or not.

S. Temple showed cause. The plaintiff cannot be compelled to proceed in this cause; for the right of action which he had is now vested in the assignees of the Insolvent Debtors Court, and it would be absurd to force a man to go on with a suit in the result of which he has no interest. *Taylor v. Montague*, 2 M. & W. 315, and *Frodsham v. Rust*, 4 Dowl. 90, will probably be relied on by the other side. In the former case the plaintiff became bankrupt after issue joined, and his assignees having refused to proceed with the action, the court said, "The bankruptcy has put an end to the plaintiff's right of action and vested it in the assignees, who refuse to proceed with the suit. The rule can be discharged only on a peremptory undertaking, and on the plaintiff giving security for the costs of the cause within a month from this time; otherwise the rule must be absolute." In the latter, where the plaintiff had become insolvent after the commencement of the action, Coleridge, J., held the defendant entitled to judgment as in case of a nonsuit unless the plaintiff would give a peremptory undertaking. But the subsequent case of *Cross v. Robertson* (7 Man. & G. 640) is at variance with those authorities, and has the good sense of the matter on its side. There, after issue joined, the plaintiff having become bankrupt, the court refused to make absolute a rule for judgment as in case of a nonsuit; and on the defendant's counsel offering a *stet processus*, Tindal, C. J., said *he* might give it so far as he was concerned, but the assignees might do as they pleased. It did not, however, appear whether they had taken up the cause. If the defendant in the present case desires to have the cause tried, he can take it down by proviso.

Wise, in support of the rule. The statute which gave this species of judgment has clothed every defendant with the right to compel the

¹ 16 Jur. 67; 21 Law J. Rep. (N. S.) Exch. 80.

Gavin v. Allan.

plaintiff to proceed with his action in the regular course or be nonsuited. If the plaintiff's excuse for not proceeding be the intervention of the assignees, it lies on him to show the fact; but he has not done so. *Taylor v. Montague* and *Frodsham v. Rust* are express on the point; neither of which, nor any other authority, was cited in *Cross v. Robertson*.

[POLLOCK, C. B. The circumstances of *Taylor v. Montague* were not precisely the same as those of the present case.

PARKE, B. Why should not there be a *stet processus* ?]

Temple. The plaintiff will consent if the court thinks he has the power to do so.

PER CURIAM. This rule must be discharged unless the parties will agree to a *stet processus*. The assignees cannot then proceed with the action, but may bring a fresh one if they think fit.

A *stet processus* was then entered by consent.

CROWN CASES

RESERVED FOR THE CONSIDERATION AND DECISION

OF THE

COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1851-52.

REGINA v. MURDOCK.¹

November 15, 1851.

Embezzlement — Venue.

The duty of a servant was to go into a neighboring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night.

The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Two months afterwards his master met him in N., and asked him for the money, upon which he stated that he was sorry he had spent it:—

Held, that there was evidence for the jury of an embezzlement in N.

THE prisoner was tried before Parke, B., at the last assizes for the county of the town of Nottingham, on an indictment for embezzling two sums, the property of his master, James Macqueen. The prisoner was a travelling salesman, and his duty was to go into Derbyshire every Monday, and to sell goods and receive the money for them there, and to return with it to his master, in Nottingham, on the Saturday. He received the two sums mentioned in the indictment, on the 6th of May, in Derbyshire, and did not return the following Saturday, nor at all, to his master's. There was no evidence of what became of him till two months after, when he was met by his master in Nottingham, who asked him what he had done with the money, and he said he was sorry for what he had done; he had spent it. The prisoner was found guilty; but as the learned judge doubted whether he could be properly convicted on this evidence of embezzlement in the town of Nottingham, he did not pass sentence;

¹ 5 Cox, C. C. 360; 21 Law J. Rep. (N. S.) M. C. 32; 16 Jur. 19; 2 Den. C. C. 298. Before Lord CAMPBELL, C. J., PARKE, B., MAULE, J., TALFOURD, J., and MARTIN, B.

Regina v. Murdock.

but reserved the case for the consideration of the judges. See *R. v. Taylor*, 3 Bos. & P. 596. No counsel was instructed on the part of the prisoner.

Manson, for the prosecution. There was jurisdiction to try the prisoner in Nottingham. The fraudulent omission to account according to his duty in Nottingham, was evidence of embezzlement there. *R. v. Jackson*, 1 Car. & K. 384.¹ The receipt alone is no offence, unless, as was put in *R. v. Hobson*,² 1 East, P. C. Add. p. 24, the denial afterwards is regarded as evidence that the original receipt was with intent to steal; and in that case there was a receipt in one county, a denial in another, and then, in effect, a second denial in the first county, in which it was held that the prisoner was properly tried. *R. v. Taylor*,³ 3 Bos. & P. 596, is also in point. Here

¹ *R. v. Jackson*. The prisoner was indicted for embezzlement. He was authorized to receive money for his mistress, and his duty was, on the evening of every day, to render her an account of all that he had received for her in the course of that day, and to pay over the amount. He received on three different days three sums, which he neither accounted for nor paid over. It was objected for the prisoner, that as he had not denied the receipt of those sums, nor delivered any written account in which they were omitted, he could not be convicted; but Coleridge, J., said, that if he wilfully omitted to account for and pay over, at the end of each day, according to his duty, the sums received in the course of that day, such wilful omission was quite equivalent to a denial of the receipt of the money.

² *R. v. Hobson*, 1 East, P. C. Add. 24, and Russ. & Ry. 56. The prisoner was indicted in Shropshire. He was authorized to receive, and did receive money for his master in that county. His master lived in Staffordshire, and the prisoner, on his return there, denied the receipt of the money. Some time afterwards the prisoner was sent by his master into Shropshire; and there desired a search to be made in the room where he was said to have received the money. Two questions were submitted to the judges; first, whether, under the repealed statute 39 Geo. 3, c. 85, an indictment might not be found and tried in the county where the money or goods were received, although there was no evidence of any other fact locally arising within the same county? Secondly, whether, if further local proof were necessary, the subsequent conduct of the prisoner in Shropshire was not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? A majority of the judges thought the conviction right. Lawrence, J., thought there was no evidence of embezzlement in Shropshire. The other judges were of opinion that he might be indicted in Shropshire, where he received, as well as in Staffordshire, where he embezzled the money by not accounting; but as the statute had made the receiving and embezzling amount to larceny, the offence was a felony in the county where the property was first taken; and that the indictment might be there or in any other county into which he carried it.

³ *R. v. Taylor*, 3 Bos. & P. 596; 2 Leach, 974; Russ. & Ry. 68. The prisoner was indicted in Middlesex for embezzling 10s.; and Lord Alvanley, C. J., in delivering the opinion of the judges, said, "In the present case, no doubt can be entertained. The prisoner being sent over Blackfriars bridge, into the county of Surrey, there received 10s. for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use, until after he had returned into the county of Middlesex. It was not proved that the money was ever embezzled until the prisoner was in the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the things to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the

Regina v. Murdock.

the prisoner ought to have accounted on the Saturday night; and there is no evidence where he was at that time; but the reasonable presumption is that he had returned to Nottingham. Even if the felony was commenced in Derbyshire, it was not completed until he had returned to Nottingham; and by 7 and 8 Geo. 4, c. 64, s. 12, if a felony is begun in one county and completed in another, the trial may be in either.

PARKE, B. We do not know where the felony began in this case, because it commences with the fraudulent abstraction of the master's money.

LORD CAMPBELL, C. J. The question reserved is, whether there was evidence to go to the jury of an embezzlement in Nottingham; and I must say that I cannot entertain any doubt that there was evidence, upon which the jury might have come to the conclusion that there was an embezzlement in Nottingham. The jury might, from the evidence, have supposed that the story told by the prisoner, of his having spent it before, was false, or that he had spent it in Nottingham.

PARKE, B. Upon consideration, I think that there was evidence to go to the jury, of an embezzlement in Nottingham, by reason of his omission to return and account on the Saturday night, the non-accounting being evidence of his intention to embezzle. Lord Alvanley, in *R. v. Taylor*, says that the mere spending of the money is not sufficient of itself to constitute embezzlement, because the servant is not bound to pay over the identical money received, but may substitute other money to the same amount. It was held there, that if the prisoner spent the money in Surrey, and then came into Middlesex and refused to account there, that was evidence of embezzlement in Middlesex; until he had refused to account, the evidence of his intention to embezzle was wanting.

MAULE, J. I agree in the conclusion at which Lord Campbell and my brother Parke have arrived; but as I do not agree in the view which the latter has taken of this case, I think it necessary to state

whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he received, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could, with certainty, say, that the prisoner intended to embezzle the money. In this case, there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, until he refused to account to his master. We are therefore of opinion that the prisoner was properly indicted in the county of Middlesex."

Regina v. Philpotts.

the grounds of my opinion. It appears to me that there was evidence for the jury that the offence was committed when, in the town of Nottingham, two months afterwards, the prisoner was met by his master, and being asked for the money, he did not hand it over. It was then his duty to have handed over, not the same money which he had received, but money to the same amount; and when he did not do so, he committed the offence. The mere non-accounting will not do, unless at the time of his refusal to account he is present in the county in which he is tried. The non-return with the money on the Saturday night would not do, because that would have happened if the prisoner had never come to Nottingham again at all. According to the view taken by my brother Parke, if the prisoner had received and spent the money in Derbyshire, and remained there six months, and been apprehended there, he would still have been triable in Nottingham; although he went into Derbyshire on a lawful errand, and never returned to Nottingham as long as he lived, yet, according to the opinion of my brother Parke, he would have been guilty of embezzlement in Nottingham. The confusion has arisen from not noticing that, in all the cases which say that the non-accounting is sufficient evidence of embezzlement, there is the fact that the prisoner is tried in the county where he refused to account.

TALFOURD, J., concurred.

MARTIN, B. I think that there was evidence for the jury; but, at the same time, it is quite clear to me that the embezzlement was not in Nottingham.

Judgment affirmed.

REGINA v. PHILPOTTS.¹

November 15, 1851.

Perjury — Evidence — Materiality.

Upon the trial of an ejectment, the title of the lessor of the plaintiff depended upon the fact that M. survived J. The will of J. was irrelevant to the title, but proof of the probate was relevant with reference to the time of J.'s death. A copy of the will of J. was tendered in evidence, and, on objection being made, the plaintiff's attorney falsely swore that he had examined the copy with the original, in the registry at Llandaff; and, upon further objection that the probate ought to be produced, or the Act-book proved, he further falsely swore that he had examined the memorandum at the foot of the copy with the entry in the Act-book. The judge then offered to receive the document, but the counsel withdrew it. The memorandum was, in fact, a copy of an entry in a book called "The Act-Book," but not a copy of the act of probate, so that the evidence, if true, would not have rendered the document legally admissible:—

Held, nevertheless, that the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury.

¹ 5 Cox, C. C. 363; 16 Jur. 67; 21 Law J. Rep. (N. S.) M. C. 18; 2 Den. C. C. 302. Before Lord CAMPBELL, C. J., MAULE, J., PLATT, B., TALFOURD, J., and MARTIN, B.

Regina v. Philpotts

THE following case was reserved by Erle, J:—

Upon the trial of the cause of *Doe d. Richard v. Griffiths*, a copy of the will of William Joseph was tendered, and, on objection to its admissibility, the present defendant, who was then attorney for the lessors of the plaintiff, swore that he had examined the copy produced, with the original will, in the registry at Llandaff, and, upon further objection, that the original will was inoperative in respect of a chattel interest, and that therefore, either the probate ought to be produced, or the Act-book proved, the defendant further deposed, that he had examined the memorandum at the foot of the copy of the will with the entry in the Act-book at the said registry.

Upon this evidence the judge offered to receive the document in evidence, but the counsel for the plaintiff withdrew it.

Upon the trial of the present indictment, it was proved that the defendant had not made either of the examinations which he had so deposed to, and he was found guilty of perjury.

But I reserved the question whether the false oath was relevant and material to the issue being tried, so as to amount to perjury. As to which the following are the facts:

On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term which had been granted to William Joseph and Rees Morgan, jointly, and his title was, that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and, on her marriage, made a settlement, under which that term vested in him. The will of Joseph was irrelevant to this title, but the time of his death was a material fact in order to prove that Morgan had survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title. The purpose of the plaintiff's counsel, in tendering the evidence, was to clear a doubt respecting the interest of Joseph in the term, which was expected to be raised by the defendant, and, after the document was withdrawn, the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff; but the purpose for which the document was offered was not stated at the time of the trial of the ejectment.

It further appeared that, at the registry at Llandaff, it was the practice to indorse the act of probate on the original will, and that the book called the Act-book contained a daily account of the matters of business completed in the registry, and that the memorandum at the foot of the document in question, was a copy of the entry in this book relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will.

It follows that the examination of the document produced with the entry in the book called the Act-book, at Llandaff, did not render the document legally admissible as an examined copy of the act of probate.

Judgment was postponed, and the defendant was discharged on recognizance, with sureties to appear at the next assizes for Monmouth.

Regina v. Philpotts.

Gray, for the prisoner. The question here is, whether the oath taken by the prisoner was in relation to a matter relevant to the issue. The will of Joseph was wholly irrelevant; but the probate was not, because the lessor of the plaintiff was bound to prove that Morgan survived Joseph. The evidence, however, of the prisoner, that he had examined the memorandum with the Act-book, turns out to be wholly immaterial, because the Act-book does not contain the judgments of the court granting probate, but only private memoranda of the business daily transacted in the registry at Llandaff.

[MAULE, J. By swearing that he had made the examination, he enabled himself to raise a question as to the admissibility of the document.]

But the evidence was not material to the issue.

[MAULE, J. Is that necessary? The evidence must be taken in a judicial proceeding, and must be material, but where do you find, that it must be material to the issue?]

In *Reg. v. Benesech*, Peake, Add. Cas. 93, where perjury was assigned upon an answer in chancery denying a promise, which, not being in writing, was void by the Statute of Frauds, and Lord Kenyon said, that "he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and supposing it, in fact, to have taken place and been acknowledged by the defendant, could not be enforced either at law or in equity; that court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury." So, in *Reg. v. Dunston*, R. & Moo. N. P. R. 109, where perjury was assigned upon an answer in chancery, denying a parol agreement for the purchase of a freehold estate, (the bill having been filed to compel a specific performance of that contract,) Abbott, C. J., said:—"In the present case the defendants have in their answer pleaded the statute, and insisted that this agreement, not being in writing and relating to the sale of land, is within the 4th section of that statute, and cannot be enforced. . . . These defendants, therefore, having insisted upon the statute in their answer, the question is whether, under such circumstances, the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false, should be material and relevant to the matter in issue. The matter here sworn is, in my judgment, immaterial and irrelevant, and the defendant must be acquitted." It is not, of course, necessary that the evidence should directly and immediately relate to the matter in issue; it is sufficient if it goes to affect the verdict of the jury. Thus, in *Reg. v. Griepe*, 1 Ld. Raym. 256; Salk. 513, perjury was assigned upon a statement that an attesting witness to a lease and release was at a distant place at the date of it, and it was held that false evidence, given as to the credit of a witness, is perjury, though the judgment was arrested on another ground. It is essential to perjury that the false statement should be of some fact, which may mislead the judge or the jury in their decision. Now, here the fact sworn to was material neither to the decision of the judge or the jury.

[LORD CAMPBELL, C. J. The evidence was offered to induce the judge to admit the document.]

Yes; but it was not a question of fact for the judge, whether the examination had or had not been made. It might subsequently, if it had been contradicted by the other side, have become a question for the jury; but it never arrived at that point.

[MAULE, J. A false statement in a judicial proceeding, material to that proceeding, is perjury. Here, the statement was made in a judicial proceeding, to induce the judge to receive evidence; and it attained the object, because the judge expressed his readiness to receive it.]

The question reserved is, whether the evidence was material to the issue; and it clearly was not. The document, even if it had not been withdrawn by the counsel, was clearly inadmissible in point of law.

[LORD CAMPBELL, C. J. The withdrawal of it can make no difference, because we must look at the state of things when the false swearing took place.]

If at that time the document was such that it could not legally be submitted to the jury, the false statement is not perjury.

[MAULE, J. But, suppose that the evidence had been received and submitted to the jury, would the defendant in that case have been guilty of perjury?]

It must always be assumed that the judge will act legally.

[MAULE, J. Then, supposing a bill of exceptions to be tendered to the ruling of a judge as to the admissibility of evidence, the question, whether a witness committed perjury on the trial, may depend upon the ultimate decision of that bill of exceptions in the House of Lords.]

There cannot, however, be perjury unless there be some tribunal which is to judge of the fact; and there was no such tribunal in this instance.

[TALFOURD, J. Suppose a judge to rule that an entry was necessary, to avoid a fine; and thereupon the attorney should get up and swear falsely to the necessary formalities; would he not be guilty of perjury, though it should turn out that the ruling of the judge was wrong?]

MAULE, J. Or, suppose that illegal evidence is admitted because no objection is made to its reception?]

In that case it must be assumed that the evidence was legal and material.

Keating, contra, was not called upon.

LORD CAMPBELL, C. J. According to the law, as it stood when the trial took place, in which this false swearing occurred, I am of opinion that the conviction is right. It is quite clear that the false swearing took place in a judicial proceeding; then, can it be said that it was with reference to a fact wholly immaterial to that proceeding? One great question was, whether Joseph died before Morgan; it was ne-

Regina v. Key.

cessary to prove that he did; and the probate of Joseph's will, whilst Morgan was still alive, would be evidence of that fact. Then, an alleged copy of the probate was offered, and, to render it admissible, a witness swore that he had examined it with the Act-book, although he had made no such examination. The judge was prepared to receive it; and if he had received it, and rightly received it, though the death of Joseph was also proved by parol, it would have been corroborative evidence, and material to the issue. It was withdrawn; but the question, whether perjury had been committed, must depend upon the state of things when the witness left the box. This brings us to the question, whether it is less perjury if the document turns out not to be admissible in evidence, and the judge has done wrong in admitting it. If that were so, it would, as has already been observed, make the commission of the offence depend upon the decision of a nice question of law upon a bill of exceptions in the House of Lords. Here the evidence was offered to procure the admission of a document; that document, if admissible, would be material to the question being tried; and the evidence was false. Here, therefore, are all the ingredients necessary to constitute the crime of perjury.

The other judges concurred.

Conviction affirmed.

REGINA v. KEY; REGINA v. SHUTTLEWORTH.¹

November 22, 1851.

Practice—Mode of Proceeding upon Indictment charging previous Conviction—14 & 15 Vict. c. 19, s. 9.

When an indictment charges a previous conviction, the proper course is to arraign the prisoner upon the whole indictment, and, if he plead not guilty, then to swear the jury, and to charge them in the first instance to inquire only as to the subsequent offence, reading to them only that part of the indictment, unless evidence of character should be given on the part of the prisoner; but after he has been convicted of that subsequent offence, then, without reswearing them, to read the other part of the indictment to the jury, and charge them to inquire as to the previous conviction.

THE following cases were reserved at sessions for the purpose of ascertaining the proper mode of proceeding under the recent act, 14 & 15 Vict. c. 19, s. 9, upon indictments charging previous convictions.

REGINA v. KEY.

The prisoner in this case was indicted at the Michaelmas sessions for the county of Leicester, held at Leicester, on the 13th October, for

¹ 5 Cox, C. C. 369; 21 Law J. Rep. (N. S.) M. C. 36; 15 Jur. 1066; 2 Den. C. C. 347-351. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B.

Regina v. Key.

having stolen a coat; and there was another count in the indictment charging the prisoner with a previous conviction for felony. The prisoner, having been arraigned, pleaded not guilty; and having declined to challenge any of the jury, the jurors were sworn and charged in the usual way to inquire whether the prisoner was guilty or not. The jury, having returned a verdict of guilty on the first count, were then charged to inquire into the fact of the previous conviction; when it was contended by the counsel for the prisoner that the jury must be resworn to try the new matter; and the counsel for the crown admitting that, according to the practice adopted on the authority of Parke, B., the jury must be resworn, the deputy chairman, who presided, directed that the oath, according to the form hereinunder set forth, should be administered to the jury. On the officer of the court proceeding to administer such oath, the counsel for the prisoner claimed the right of challenging the jury on the ground that the prisoner, when arraigned, had been told by the clerk of the peace that if he would challenge the jurors, or any of them, he must do so "as they came to the book to be sworn, and he should be heard;" that the jurors were then, for the purpose of trying the fact of the prisoner's previous conviction, "come to the book;" and accordingly, on the name of the first man of the jury being called, the counsel for the prisoner challenged him, and further intimated his intention of challenging in like manner each man of the jury who had convicted the prisoner on the first count of the indictment. The deputy chairman disallowed the claim to challenge the jury on the grounds that the prisoner had been arraigned on the three counts, that his plea had been taken to the whole indictment, and that his right of challenge should have been exercised in the first instance, and before the jury were sworn to make true deliverance between him and our sovereign lady the queen. The jury were then sworn as follows: "You shall well and truly try whether the prisoner has been before convicted of felony in manner and form as in the indictment is alleged;" and the prisoner was given in charge to the jury on the third count of the indictment charging a previous conviction. He was found guilty, and sentenced to transportation for seven years; but, at the instance of the prisoner's counsel, the court reserved the following question for the decision of the judges, viz.: whether, under the circumstances detailed in this case, the challenge made on behalf of the prisoner should have been allowed.

This case was not argued by counsel.

LORD CAMPBELL, C. J., in delivering the judgment of the court, said, the prisoner was arraigned in the usual, and, I think, proper manner; and the jury were properly charged in the first instance with that part only of the instrument which alleged the larceny. The prisoner was convicted, and then it was stated by the counsel for the prisoner that it was the practice of Baron Parke to direct the jury to be sworn afresh. I can only say that I have had the unspeakable advantage of travelling circuit twice with that learned judge, and that on those occasions he followed a totally different course.¹ The proper mode of proceeding

¹ On the Midland circuit, at the last summer assizes, 1851, when Baron Parke was

Regina v. Shuttleworth.

is to arraign the prisoner upon the whole indictment; but to charge the jury with the subsequent offence only in the first instance, and after conviction of that offence, then to charge them with the previous conviction. In this case the jury were sworn afresh; and the prisoner's counsel claimed the right to challenge every one of them; but I am glad to say that the chairman was firm in resisting that claim; for we are all of opinion that the challenge was properly disallowed.

REGINA v. SHUTTLEWORTH.¹

At the sessions for the borough of Manchester, held before R. B. Armstrong, Q. C., Recorder, on the 4th August, 1851, George Shuttleworth was arraigned on an indictment charging him with larceny, and also with having been previously convicted of felony; and according to the invariable practice in that court before that time, both counts were read to the prisoner, and he pleaded not guilty to the whole indictment. At the trial, the count for larceny only was read by the clerk of the peace to the jury, and the witnesses in support of that charge were heard, and the jury found the prisoner guilty. The clerk of the peace then proceeded to read to the jury the further charge, that the prisoner had been previously convicted of felony, when the counsel for the prisoner objected that the charge could not be gone into, and he further stated that it was his intention, however the jury might decide that question, to move in arrest of judgment generally. The court decided that the trial should go on, and the certificate of conviction having been put in, and the identity of the prisoner proved, the jury found that the prisoner had been previously convicted of felony. The prisoner's counsel then moved in arrest of judgment, contending that the plea of the prisoner having been taken contrary to the provisions of the late act, (14 & 15 Vict. c. 19, s. 9,) was void, and that all the subsequent proceedings were a nullity, and that no judgment could be given on a verdict so found. The court overruled the objection, and sentenced the prisoner to be transported for seven years. The execution of the judgment was respited, and the convict is now in prison. The question for the Court of Criminal Appeal is, whether that sentence, under the circumstances stated, was legal, or whether any judgment could be passed on the verdict so given?

Milward, for the prosecution, referred to *Regina v. Key*, *supra*.

LORD CAMPBELL, C. J. There is no doubt upon this point. The new statute, 14 & 15 Vict. c. 19, s. 9, shows what is the proper course of proceeding. Unquestionably the course is to arraign the prisoner, in the first instance, upon the whole indictment; but, upon his plead-

accompanied by Maule, J., the practice of swearing the jury afresh was certainly adopted. At Northampton, in the first case which occurred, Parke, B., expressed his opinion that, under 14 & 15 Vict. c. 19, s. 9, the jury ought to be sworn again, one by one, to try the question whether the prisoner had been previously convicted; and the learned judge himself drew the form of oath as given in the statement of Key's case. The same course was afterwards followed in all other cases during the same circuit.

¹ See *Ante*, p. 584.

Regina v. Shrimpton.

ing not guilty, to read to the jury only that part which contains the principal charge; and, unless evidence of character should be given upon the part of the prisoner, after his conviction of that offence to read to the jury, and without reswearing them, to charge them to inquire into the second part of the indictment charging the previous conviction. That is the opinion of all the judges.

ALDERSON, B. This matter has been considered by the judges, and we are all, I believe, of opinion that the practice is not substantially altered by the new act.

Convictions affirmed in both cases.

REGINA v. SHRIMPTON.¹

November 22, 1851.

Practice — Previous Conviction in reply to evidence of Character.

Upon the trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by the prisoner's counsel, stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. Thereupon the prosecution proved that the prisoner had been convicted of larceny ten years before:—

Held, that the previous conviction was admissible under 5 & 7 Will. 4, c. 111, and 14 & 15 Vict. c. 19.

THIS was a case reserved by the Worcestershire Sessions.

At the General Quarter Sessions of the Peace for the county of Worcester, held on the 13th day of October, 1851, James Shrimpton was indicted for felony. The indictment contained a statement of the previous conviction of the prisoner for felony in the year 1838. In the course of the trial, John Roberts was examined as a witness for the prosecution. On cross-examination by the counsel for the prisoner, John Roberts stated that he had known the prisoner for six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The counsel for the prosecution thereupon claimed, under the provisions of the statute 14 & 15 Vict. c. 19, s. 9, to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment. This evidence was objected to by the prisoner's counsel as inadmissible, first, because the evidence of the good character of the prisoner elicited from the witness Roberts was confined to the period between the years 1844 and 1851, and therefore evidence of the prisoner's conviction in 1838 was not in answer thereto; secondly, because Roberts, being a witness for the prosecution only, the prisoner did not, by the answers of Roberts to questions put to him in cross-examination, give evidence of his (the prisoner's) good character within the meaning of the 14 & 15 Vict. c. 19, s. 9; the court overruled the objection, and the conviction of the

¹ 5 Cox, C. C. 387; 21 Law J. Rep. (N. S.) M. C. 37; 15 Jur. 1089; 2 Den. C. C. 219. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B.

Regina v. Shrimpton.

prisoner in 1838 was thereupon given in evidence before the verdict was returned. The prisoner was found guilty and sentenced to nine months' imprisonment, but the Court of Quarter Sessions reserved for the opinion of her Majesty's judges the question of law whether, under the circumstances above stated, proof of the said previous conviction of the prisoner was properly received in evidence before the verdict of guilty was returned.

Selfe, for the prisoner. This depends upon the statute 6 & 7 Will. 4, c. 111, the words of which are the same as those used in 14 & 15 Vict. c. 19. They were passed to remedy the practice, which had obtained under 7 & 8 Geo. 4, c. 28, of treating the previous conviction as part of the offence charged, which was supposed to operate unfairly to the prejudice of the prisoner; and the court will so construe them as to give full effect to the intended remedy. In the present case, the prisoner has not "given evidence" of his good character, which means calling witnesses on his part, and not merely asking questions of the witnesses for the crown. The language of the statute is not satisfied, unless such evidence is given as would entitle the crown to a reply. The resolutions of the judges, under the Prisoners' Counsel Act, speak of the deposition being read as part of the evidence of the cross-examining counsel, and entitling the counsel for the prosecution to reply. Baron Parke, in *R. v. Gadbury* (8 Car. & P. 676,) certainly appears to have expressed an opinion the other way; but the point was not decided in that case. Suppose a witness, under cross-examination, should of his own accord give evidence as to the prisoner's good character, would that let in the previous conviction?

[LORD CAMPBELL, C. J. That would be a very different question. I think, at present, that in that case I should not admit the conviction.]

Secondly, even if evidence of character was given by the prisoner at all, within the meaning of the statute, this conviction was not "in answer thereto." It referred to a different time.

[ALDERSON, B. You say he is not likely to have committed this offence, because he is a man of good character; then, in answer to that, they say he is likely, because he is not a man of good character.]

It is not every sort of evidence as to character which would be relevant. It would be no answer to a good character for honesty, to show that he was an immoral man, that he had been convicted of a rape or a violent assault.

LORD CAMPBELL, C. J. At all events, a conviction for theft is surely in answer thereto.

No counsel appeared for the crown.

LORD CAMPBELL, C. J. We are all agreed that this conviction is right. The statement in the case is, that John Roberts was examined

Regina v. Preston.

as a witness for the prosecution; that on cross-examination by the counsel for the prisoner, he stated that he had known the prisoner six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The words of the legislature are, "that if, upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions, at the same time that they inquire concerning such subsequent offence." The object of the legislature was, to defeat the scandalous attempt often made by persons, who had been repeatedly convicted of felony, bringing witnesses, or cross-examining the witnesses for the prosecution, to prove that the prisoner had previously borne a good character for honesty. The mischief is as great, whether such evidence be elicited from the witnesses for the prosecution, or from those who are called on the part of the prisoner. Indeed greater; the jury are more likely to be deceived by evidence in favor of the prisoner which falls from the witnesses for the crown. The enactment would have been defective, if it had allowed evidence of good character to be given, and not the evidence of bad character also. The question then is, did the prisoner in this case give evidence of good character, so as to render it lawful for the prosecutor to offer the previous conviction in evidence? It seems to me, that the natural and necessary interpretation to be put upon the words of the statute is, that if, either by calling witnesses on his part, or by cross-examination of the witnesses for the crown, the prisoner relies upon his good character, it is lawful for the prosecutor to give the previous conviction in evidence.

ALDERSON, B. The words of the statute are "give evidence,"—not "call witnesses,"—and the two certainly are not equivalent.

The other judges concurred.

Conviction affirmed.

REGINA v. PRESTON.¹

November 22, 1851.

Larceny—Lost Goods—Taking.

Upon the trial of an indictment for stealing a bank note which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the

¹ 5 Cox, C. C. 390; 21 Law J. Rep. (N. S.) M. C. 41; 16 Jur. 109; 2 Den. C. C. 353. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B.

Regina v. Preston.

prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if at that time, he had not that knowledge or belief, he was not guilty:—

Held, a misdirection; because, if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny.

THE following case was reserved by the Recorder of Birmingham:—

Michael Preston was tried before me, at the last Michaelmas sessions for the borough of Birmingham, upon an indictment which charged him in the 1st count with stealing, and in the 2d count with feloniously receiving, a 50*l.* note of the Bank of England. It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question, with others, on Saturday, the 18th of October, from a Mr. Ledsam, who, before he handed it to the prosecutor, wrote on the back of it the words, “Mrs. Collis.” It was further proved, that Collis was a very unusual surname in Birmingham, and almost, if not quite confined to the family of the prosecutor, a well-known master manufacturer. About four or five o’clock the same afternoon, the prosecutor accidentally dropped the notes in one of the public streets of Birmingham, and immediately gave information of his loss to the police, and also caused hand-bills, offering a reward for their recovery, to be printed and circulated about the town. On Monday, the 20th, about three o’clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard any thing of them, he would let the police know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o’clock, on the same afternoon, the prisoner went to the shop of Mr. Nickley, in Birmingham, and, after inquiring if he (Nickley,) had heard of the loss of a 50*l.* note, stated that he (the prisoner,) thought he knew parties who had found one, and he asked Nickley whether the finders would be justified in appropriating it to their own use, to which Nickley replied that they would not. At four o’clock the same afternoon the prisoner changed the note, and was, later in the same evening, found in the possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts. He was then taken into custody, and on the following day, October 21, stated to a constable that when he was alone in his own house, on Sunday, a tall man, whom he did not know, came in and offered him a 50*l.* note, for which he (the prisoner,) gave him fifty sovereigns. The police officers previously told the prisoner, that they were in possession of information that one Tay, who was known to the prisoner, had found the note, but Tay was not called, nor was

Regina v. Preston.

any evidence given as to the part (if any,) which he took in the transaction. Upon these facts, I directed the jury, that the important question for them to consider was, at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. I also told the jury, that there was no evidence of any other person having possession of the note after it was lost, except the prisoner, but that even though the prisoner might not be the original finder, still, if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use, after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny. The jury found the prisoner guilty upon the 1st count, and I request the opinion of the judges as to the validity of the conviction. The prisoner was discharged on the recognizances of himself and two sureties, to appear and receive judgment at the next sessions.

O'Brien, for the prisoner. The direction of the learned Recorder was wrong. To constitute larceny there must be a trespass; and there is no trespass, if the prisoner acquires possession lawfully in the first instance. This direction makes the question of larceny or no larceny, depend upon the formation of a dishonest intention in the mind of the prisoner, after he has acquired the means of ascertaining the owner. That is contrary to all the authorities collected and commented upon in *Regina v. Thurborn*, 1 Den. C. C. 387; s. c. nom. *Regina v. Wood*, 3 Cox, C. C. 453, where Parke, B., observes:—"The result of these authorities is that the rule of law on this subject seems, to me, to be that if a man find goods that have actually been lost and appropriate them with the intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would, probably, be presumed that the taker would examine the chattel, as an honest man ought to do at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case, the first taking did not amount to larceny, because the note was really lost,

Regina v. Preston.

and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note, as proved, that he believed the owner could not be found; and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently and afterwards appropriated it without knowledge of the ownership, it would not have been larceny: nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case, more than the others, and consequently, no larceny." Again in *Merry v. Green*, 7 M. & W. 623, 632, the same learned judge remarked:—"It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also from *Wynne's case*, 1 Leach, 413; 2 East, P. C. 664, that, if under the like circumstances he acquire possession and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny." The latter part of that sentence is qualified by a passage in the judgment in *Thurborn's case*, where the learned judge says:—"Some of the cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's case*; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding."¹ The cases of *R. v. Leigh*, 2 East, P. C. 694, and *R. v. Mucklow*, 1 Moo. C. C. 160, are also strong to show that the *animus furandi* must exist at the time of the original taking. In the former the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession. The jury, finding

¹ *Wynne's case* was that of a hackney coachman, who abstracted the contents of a parcel left in his coach by a passenger.

Regina v. Preston.

that she took them originally merely from a desire of saving them for, and returning them to the prosecutor, and that she had no evil intention till afterwards, the judges held that it was a mere breach of trust, and not a felony. In the latter case, the defendant, to whom a letter, addressed to a person of the same name, was delivered by mistake, opened it, and appropriated to his own use the bill of exchange which it contained; yet it was held no larceny, because at the time when the letter was delivered to him he had no *animus furandi*.

Bittleston, for the crown. The case of *R. v. Thurborn* was brought under the consideration of the Recorder; and construing his direction with reference to the facts stated, it does in substance follow the rule there laid down. It only means that the prisoner would be guilty of larceny, if when he first took complete possession of the note *animo furandi*, he then knew or had the means of knowing the owner.

[ALDERSON, B. The direction does not exclude the supposition that the prisoner in the first instance received the note with an honest intention, but afterwards altered his mind, and in a day or two resolved to appropriate it to his own use. But my brother Parke, in *Thurborn's* case, decided that the dishonest intention must exist as soon as the finder has taken the chattel into his possession so as to know what it is.]

It is conceded that the very first moment of taking is not that at which the *animus furandi* and knowledge of the owner must exist to constitute larceny; because, the chattel must be taken into the hand to ascertain what it is. The original possession, therefore, must necessarily be lawful in every case; and if the dishonest intention arising at the next minute may make the finder guilty of larceny, why may not the same dishonest intention arising afterwards have the same effect? What is a proper time for examining the thing may vary in different cases; and, if a man takes time to make inquiries, for the purpose of satisfying himself whether he can keep the chattel without risk of discovery, and ultimately resolves to appropriate it, is he to be held not guilty of larceny, because he did not immediately make up his mind to deprive the owner of it? It is stated generally in the text-books, (1 Bl. Com. 295, 5th ed.,) that the finder of lost goods has a special property in them; and so, according to *Armory v. Delamirie*, 1 Stra. 505, he has against all but the true owner; but as against the true owner he has no property whatever, and it is submitted, at all events with regard to marked property, that as between the finder and the loser, the possession of the former is, in law, that of the latter, so long as the latter intends to act honestly. He holds merely for the true owner; he has a bare custody; but as soon as he resolves to appropriate the goods to his own use he then converts that lawful custody into an unlawful possession; he commits a trespass; and is guilty of larceny, according to that class of cases, where the owner, by delivering goods to the prisoner, does not part with the possession, but gives him the charge or custody of them only.

Regina v. Preston.

[ALDERSON, B. What do you say to that part of the direction which supposes that the prisoner was not the original finder?]

It makes no difference whether the prisoner himself picked up the lost note, or whether the person, who did, brought it to him and informed him of all the circumstances. That intermediate person might act with perfect honesty; and the prisoner receiving it under those circumstances would be in the situation of a finder.

[MARTIN, B. Suppose a man takes an umbrella by mistake, and, after keeping it for a few days finds the owner, but does not return it, is there a felonious taking?]

LORD CAMPBELL, C. J. You must contend that there is.]

Yes, there would be no change in the possession until the dishonest intention arose.

[LORD CAMPBELL, C. J. Can there be a mental larceny?]

ALDERSON, B. There must be a taking, and it must be a taking *animo furandi*; but the taking and the intent are distinct things.]

In the cases of carriers, where the bailment is determined by breaking bulk, there is in truth no fresh taking. The carrier has possession of all the goods delivered to him for the purpose of carriage; but when he begins to deal dishonestly with them there is a constructive taking; and Parke, B., from the observation which he makes on *Wynne's case*, in *Merry v. Green*, seems to have thought so.

LORD CAMPBELL, C. J. I am of opinion that this conviction cannot be supported. Larceny supposes a taking *animo furandi*. There must always be a taking; but in the present case it is quite consistent with the direction of the learned Recorder, that the prisoner might be guilty of larceny, though, when he took possession of it, with a full knowledge of the nature of the chattel, he honestly intended to return it to the owner whensoever he should be found; because he puts it, that the important question is, at what time the prisoner first resolved to appropriate it to his own use. But when was the taking? It is said, that whenever he changed his mind, and formed the dishonest purpose of appropriating the note to his own use, that then he took it constructively from the possession of the owner; but that dishonest purpose may have first come into his mind when he was lying in bed at a distance of many miles from the place where the note was. It seems to me, that that operation of the mind cannot be considered a taking, and that, as there was no taking except the original taking, which might have been lawful, the conviction must be reversed. It is unnecessary to go into authorities upon this subject, after the elaborate judgment of my brother Parke in *Thurborn's case*.

ALDERSON, B. In order to constitute larceny, there must be a taking as well as an intention to steal. The difficulty I feel in this case is, to know how a taking, honest at first, can be converted into a dishonest taking by the subsequent alteration of intention. It is clear, in this case, that the learned Recorder left it open to the jury to convict the prisoner, even if they thought that at first he took the note honestly, but that he afterwards changed his mind, then

Regina v. Preston.

knowing the owner; and it is argued, that the formation of the dishonest intention alters the character of the possession, though the taking may have been a week before; but I think that that is a degree of refinement which would destroy the simplicity of the criminal law. The other judges concurred.

Conviction quashed.

The American cases on the subject of larceny by a finder of lost property, are not altogether harmonious. They are here briefly stated in their chronological order. The earliest American case on this subject seems to be that of *State v. Jenkins*, 2 Tyler, 379, (1808.) It was here said, "It is incumbent upon the finder of lost property, to advertise it under the provisions of the laws of this state, (Vermont); if he neglects, and conceals or privately converts the property, he is guilty of larceny." While in *People v. Anderson*, 14 Johnson, 294, (1817,) the court were of opinion, that a *bona fide* finder of lost property, could not be guilty of larceny, by any subsequent concealment or appropriation, although the jury found that the felonious intent accompanied the first taking. The Chief Justice, however, Smith Thompson, dissented from this doctrine. In 1827, the point was before the Supreme Court of Tennessee, who advanced the untenable doctrine, that if the finder of lost property convert it to his own use, *with a full knowledge of the owner*, he is not guilty of larceny, because no trespass was committed in obtaining the possession. *Porter v. State*, Martin & Yerger, 226, (1827.) And the court relied upon the earlier case of *State v. Braden*, 2 Overton, 68, (1805,) as sustaining a similar doctrine. And see *Lawrence v. The State*, 1 Humphreys, 228, (1839.)

The rule to be gathered from the case of *Tyler v. People*, Breese, 227, (1829,) is, that if lost property has no marks by which its owner can be ascertained, it can not be the subject of larceny.

In *State v. Roper*, 3 Devereux, 473, (1832,) where a shawl was dropped in a public room, and afterwards picked up, and placed in a conspicuous place by the

defendant, who afterwards secreted it, and appropriated it to his own use, it was held no larceny, because the original taking from the ground was not with a felonious intent, and the subsequent appropriation was not a taking from the possession of the owner.

The true rule on this subject seems first to have been laid down in *State v. Weston*, 9 Connecticut, 527, (1833,) namely, that if a finder of lost property knows, or has the means of knowing, the owner, but, instead of restoring the property, convert it to his own use, he is guilty of larceny. In this case, the property found was a pocket-book, having the owner's name written in two places; and it was found that the prisoner could read and write.

The same rule was substantially adopted in the subsequent case of *State v. Ferguson*, 2 M'Mullan, 502, (1837.) So in *The People v. Cogdell*, 1 Hill, 94, (1841,) it was held that unless the finder of property lost upon the highway at the time of the finding know who the owner is, or have the means of knowing him, *instantly*, as by marks about the property, he is not guilty of larceny for subsequently appropriating it, although this was done fraudulently, and although he had *general means* of discovering the owner, by honest diligence, &c.; and the former case of *The People v. Anderson*, *supra*, was approved. And this seems to have been followed in *Lane v. The People*, 5 Gilman, 305, (1848.) See also *Regina v. Peters*, 1 Carrington & Kirwan, 245, (1843); *Regina v. Mole*, 1 Carrington & Kirwan, 417, (1844); *Merry v. Green*, 7 Meeson & Welsby, 628, (1841); *Regina v. Kerr*, 8 Carrington and Payne, 176, (1837); *Regina v. Pope*, 6 Carrington & Payne, 346, (1834.)

Regina v. Vann.

REGINA v. VANN.¹

November 22, 1851.

Nuisance — Neglect of parent to bury his child — Ability — Offer by guardians of money by way of loan.

Upon an indictment for nuisance, charging the defendant with refusing and neglecting to bury the body of his child, it was proved that the defendant was a pauper, but that the guardians, acting under the laws of the Poor Law Board, had offered him money for the purpose of enabling him to bury his child, upon his signing an undertaking to repay it on demand:—

Held, that he was not bound to accept that offer; and could not be convicted of a nuisance.

THE defendant was tried before J. Hildyard, Esq., Recorder of Leicester, at the Michaelmas sessions for the borough, for a nuisance in having refused and neglected to bury the body of his deceased child, whereby and by reason of the decomposition thereof, various noisome stenchs arose, and the air was thereby greatly infected and rendered unwholesome, to the great damage and common nuisance of the queen's subjects. The defendant, at the time of the decease of his child, on the 17th of August, was a pauper, who had been receiving relief from the parish of St. Margaret, in the Leicester Union, and, soon after the child's death, he applied to the relieving officer of that parish for assistance to bury the child. It appeared in evidence that the order of the Poor Law Commissioners, under the provisions of the statute of the 4 & 5 Will. 4, c. 76, s. 58, had been issued to the guardians of the Leicester Union, which provided that, in certain cases, relief might, if the guardians thought fit, be given by way of loan, and that one of such cases was, "where the pauper should receive relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his family." It further appeared in evidence that the guardians had laid down a rule, (which was printed and circulated in the Union,) "That the head of the family or person applying for the assistance of the parish in burying any poor person, must sign an undertaking to repay the expenses incurred, in case the guardians shall deem him or her able to do so." It further appeared that, at the time the defendant applied to the relieving officer for assistance to bury his child, he was required, in conformity to the rule laid down by the guardians, to sign a document to the following effect:—"I, W. V., the undersigned, do hereby agree on demand to repay the guardians of the poor of the Leicester Union the sum of 7s., advanced to me by way of loan, in payment for coffin and ground for my child." The defendant refused to sign this document, and the relieving officer refused to render him any assistance in the burial of the child. It was proved that the defendant removed the body of the child from his house to a yard in the neighborhood, and that the

¹ 5 Cox, C. C. 379; 21 Law J. Rep. (N. S.) M. C. 39; 15 Jur. 1090; 2 Den. C. C. 325. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B.

Regina v. Vann.

stench arising from it amounted to a nuisance. The jury were directed that the defendant was bound to provide for the burial of his deceased child, if he could in any lawful way procure the means of so doing; and that as the guardians were entitled, under the order of the Poor Law Commissioners, to give relief for the purposes of burial by way of loan, and as the defendant had been offered such relief in that manner, he was bound to receive it, and that, consequently, he was not excused from his liability to provide for the interment of his deceased child, and was liable to be convicted on the indictment for nuisance. The jury found a verdict of guilty, and the Recorder reserved a case for the consideration of this court.

O'Brien, for the prosecution.

[PLATT, B. What public duty is there to incur a debt?]

The public duty was to provide for the burial of the child.

[LORD CAMPBELL, C. J. If the defendant had the means.]

Certainly; but he had the means when the guardians offered him the money.

[LORD CAMPBELL, C. J. Would he be bound to accept the offer of a Jew to lend him money at 50 per cent. interest?]

No; the means must be legal and reasonable.

[ALDERSON, B. You would have had a better case against the guardians.]

The duty of providing burial is as imperative as that of providing sustenance, and if bread was offered upon reasonable terms to the parent of starving children, and he refused it, would he not be responsible for their death? By incurring a debt he only makes himself poorer, and if another person in his absence had buried the child for him, he would have incurred a debt to that person. *Ambrose v. Kerrison*, 20 L. J. 135, C. P.¹

[LORD CAMPBELL, C. J. Then has he committed a crime, though he has no means of doing the act? According to that argument, if he had not a farthing he would be bound to do it, and indictable for not doing it. He certainly was not bound to steal for the purpose — was he bound to beg, or to borrow?]

TALFOURD, J. The loan is only offered on the terms that it should be payable on demand. MARTIN, B., referred to a case tried at Gloucester, where a woman was convicted of the manslaughter of her child, she having neglected to apply to the relieving officer for relief, and the reason which she gave for that neglect being that she was afraid the parish officers would take proceedings against her husband to compel him to maintain her and her child.]

The question is certainly one of ability to do the act, but he had the ability when the means of doing it were placed in his hands upon

¹ The marginal note of that case is as follows: — "When a wife dies, her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker, and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband in an action for money paid."

Regina v. Cheafor.

reasonable terms, and the terms here offered were those sanctioned by the Poor Law Board.

[LORD CAMPBELL, C. J. The jury were told that there was conclusive evidence of ability. The question was not left to them.]

If the condition imposed was lawful, and one which he ought to have accepted, then he had the means.

No counsel appeared for the prisoner.

LORD CAMPBELL, C. J. Upon the question left to us, I think the conviction wrong. The direction of the Recorder cannot be supported. He told the jury that the defendant was bound to provide for the burial of his deceased child if he could in any lawful way procure the means of so doing, and so far he was right; but then he adds, "and that as the guardians were entitled under the order of the Poor Law Commissioners to give relief for the purposes of burial by way of loan, and as the defendant had been offered such relief in that manner, he was bound to receive it; and that, consequently, he was not excused from his liability to provide for the interment of his deceased child, and was liable to be convicted upon the indictment for nuisance if the jury believed the facts." That he lays down in point of law. Now there is no doubt that if a parent has the means of giving his child Christian burial, he is bound to do so, but he is not to be indicted for a misdemeanor if he has not the means, although the body of the child may occasion a nuisance, for which the parish officers would probably be liable; but we think the Recorder was wrong in telling the jury that the defendant was bound to accept the offer made by the guardians of a loan payable on demand, and that if he refused, he might be proceeded against criminally for a nuisance. We think that in point of law he was under no such obligation. The jury ought to have been asked the question whether the defendant was of ability to bury his child, and ought not to have been told as a maxim of law that he rendered himself liable to be convicted of a nuisance by refusing the offer of the guardians.

Conviction reversed.

REGINA v. CHEAFOR.¹

November 22, 1851.

Larceny — Pigeons kept in a Dove-cote, with Liberty of Ingress and Egress.

Pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times, by means of holes at the top, may be the subjects of larceny.

¹ 5 Cox, C. C. 367; 21 Law J. Rep. (N. S.) M. C. 43; 15 Jur. 1065; 2 Den. C. C. 361. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B., the judges present when the judgment was delivered; but the case was in the list for Saturday, November 15, when MAULE, J., was present, instead of ALDERSON, B.

At the Quarter Sessions for the county of Nottingham, held at East Retford, on the 7th of July, 1851, the prisoner was indicted for feloniously stealing four tame pigeons, the property of John Mansell. The pigeons, at the time they were taken by the prisoner, were in the prosecutor's dove-cote, over a stable on his premises, being an ordinary dove-cote, and having holes at the top for the ingress and egress of the pigeons, and having a door in the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, breaking open the door and taking away the pigeons. The prisoner's counsel contended that the pigeons being at liberty at any time to go in and out of the dove-cote, and therefore not reclaimed and in a state of confinement, were not the subjects of larceny. The chairman directed the jury that, in his opinion, the view contended for by the prisoner's counsel was correct, and that the pigeons were not properly the subjects of larceny. The jury found the prisoner guilty of larceny; but judgment was postponed to ask the opinion of this court whether the learned chairman's direction to the jury was right, and whether the prisoner, under the facts stated, was properly convicted.

The case was not argued by counsel.

LORD CAMPBELL, C. J., delivered the judgment of the court. After reading the case, his lordship said that they thought the direction of the chairman was clearly wrong. Pigeons must, from the nature of them, have free egress to the open air: and the question therefore was, whether there could be a larceny of tame pigeons. If not, neither could there be a larceny of chickens, ducks, or any poultry. Whether they were tame or not, was a question for the jury. *Luke's case*, Rosc. Cr. Ev. 577, is said by Mr. Greaves¹ to have been determined on the ground that the pigeons were reclaimed, not that they were shut up in boxes. It had been mistakenly supposed that Baron Parke had decided that pigeons were not the subjects of larceny unless strictly confined; there is no question that they are, even though they are allowed the liberty of going to enjoy the air when they please.

*Conviction affirmed.*²

¹ The passage referred to is in 2 Russ. on Crimes, p. 83, as follows:—"Where pigeons were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny." Upon which, in Mr. Greaves' edition, there is the following note:—"Luke's case, Rosc. Cr. Evid. 577, and, *ex relatione*, Mr. Granger. The case was determined, on the ground that the pigeons were reclaimed; and not on the ground that they were shut up in their boxes at the time they were taken."

² In *Rex v. George Brooks*, 4 Carrington & Payne, 131, (1829,) it was held that if pigeons are so far tamed that they come home every night to roost, in wooden boxes hung out by their owner, they are the subject of larceny. But as a general rule, doves are *feræ naturæ*, and are not the subject of larceny, unless there be distinct

evidence that they were in the care and custody of the owner. *Commonwealth v. Chace*, 9 Pickering, 15, (1829.) So it has been held that a sable caught in a trap in the woods, is not then a subject of larceny. *Norton v. Ladd*, 5 New Hampshire, 203, (1830.) So of ferrets, although tame and salable. *Rex v. Searing*, Russell & Ryan,

Regina v. Cheafor.

350, (1818.) So, *it seems*, of rooks. *Hannam v. Mockett*, 2 Barnewall & Cresswell, 984, (1824.) And a raccoon. *Warren v. State*, 1 Iowa, 106, (1848.) And wild bees remaining in a tree where they have hived, although confined in such tree by the own-

er of the land on which the tree stands, are not the subject of larceny. *Wallis v. Mease*, 3 Binney, 546, (1811.) *Aliter* of bees in the possession of the owner. *State v. Murphy*, 8 Blackford, 498, (1847.)

INDEX TO VOL. VIII.

Chancery.

ADMINISTRATION.

1. *Bill to enforce Administration Bond.*] The administratrix *de bonis non* of an intestate cannot in equity sue upon or enforce the administration bond given to the ordinary by the original administrator, against his estate and the co-sureties in the bond, without showing some special circumstances why the ordinary himself did not institute the proceedings. *Bolton v. Powell*, 165.
2. *Quære*, whether the ordinary himself can institute a suit in equity in his own name to enforce such bond? *Ib.*

ADMINISTRATION.

See HUSBAND AND WIFE.

ADMINISTRATORS.

See INSOLVENCY.

ADVERTISEMENT.

See BANKRUPTCY.

AMBIGUITY.

In Contract.]

See SPECIFIC PERFORMANCE.

ANNUITY.

When not subject to duty.]

See LEGACY. DUTY.

ANNUITY.

For Life.]

See WILL.

 Chancery.

APPEAL.

See BANKRUPTCY.

ATTACHMENT.

Married Woman.] An attachment for want of answer will issue against a married woman who, having appeared separately, and obtained an order to answer separately, nevertheless allows the time for answering to expire. *Thicknesse v. Acton*, 47.

ATTORNEY.

When liable for Costs.]

See COSTS.

ATTORNEY-GENERAL.

Right to File Information.]

See INFORMATION.

AUCTION.

See WINDING-UP ACTS.

BANKRUPTCY.

1. *Bankrupt Law Consolidation Act, 1849 — Certificate.*] A bankrupt was refused his certificate by the Commissioner, for an offence not enumerated in the 256th section of the statute 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit, and immediately selling the same at still lower prices. He was also refused any protection except pending an appeal. On an appeal the court refused to grant any certificate, but made an order, by consent of the assignees, giving protection for the person of the bankrupt, but leaving his property liable. *Holt-house*, in re, 277.
2. *Notice of Opposition.*] A creditor who had not given three days notice of opposition under the 198th section, and who was, therefore, refused a hearing, was not allowed to appear before the appeal-court to discharge the above order of the commissioner. *Id.*
3. 12 & 13 Vict. c. 106, s. 257 — *Judgment Certificate — Construction of Act of Partition.*] Under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106,) the commissioners have a discretionary power to refuse protection to a bankrupt, or to refuse or suspend the certificate of conformity, in any cases not within the penal enactment of section 256; and the judgment certificate mentioned in section 257, is to issue as well upon such discretionary refusal, or suspension, as upon the compulsory refusal, or suspension, in consequence of the commission of any of the offences enumerated in section 256. (Sir Knight Bruce, L. J., *Dubitante.*) *Stanton*, ex parte, 283.
4. *Power of Commissioner.*] *Semble*, that wherever the commissioner thinks that the conduct of the bankrupt has been such that he ought to be amenable to the common-law rights of the creditors, it is in the power of the commissioner to withhold the protection, and so restore those common-law rights. *Id.*
5. *Annuling Adjudication — Commissioner's Jurisdiction — 12th, 104th, and 233d sections of the Bankrupt Law Consolidation Act.*] C was adjudged a bankrupt in February, 1851, and on the 19th of the same month a duplicate of the adjudication was served on him. C did not, within the time limited by the 104th section of the 12 &

Chancery.

13 Vict. c. 106, show cause to the court against the validity of the adjudication, and on the 28th February, the adjudication was advertised in the Gazette. On the 19th March, C presented a petition to the commissioner, praying that the petition for adjudication of bankruptcy, or the adjudication thereunder, might be annulled:—

Held, reversing the decision in 15 Jur. 984; s. c. 7 Eng. Rep. 312, that the commissioner had no jurisdiction to annul the adjudication after the time allowed by the 104th section for showing cause against the validity of the adjudication had expired, and that the petition so presented to the commissioner was not a proper proceeding to dispute the adjudication, within the meaning of the 233d section of the act; and that, although a petition of appeal to the Vice-Chancellor from the order on that petition was presented within twenty-one days from the date of that order, according to the 12th section, but more than twenty-one days after the advertisement of adjudication, the bankrupt was not entitled to have the adjudication annulled. *Carter*, ex parte, 112.

6. *Bankrupt Law Consolidation Act, 1849 — Jurisdiction — Payment of Money out of Court.*] The primary jurisdiction in bankruptcy being, by the 12th section of the statute 12 & 13 Vict. c. 106, transferred to the commissioners, and the jurisdiction of the Vice-Chancellor under that act having been exclusively appellate and transferred to the Court of Appeal by the statute 14 & 15 Vict. c. 88, the Court of Appeal cannot order the payment of money out of the Bankruptcy Court, unless the application be made by way of appeal from a commissioner. *Cheetham*, in re, 279.

7. *Bankrupt Law Consolidation Act, 1849 — Advertisement of Adjudication.*] Four partners were adjudicated bankrupts. Two resided abroad. The adjudication was made on the 8th of November. On the 13th, notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th, the meeting was held to show cause against the issue of the advertisement, and the application was then made. The commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within seven days from the adjudication, he had no authority, under the 104th section of the 12 & 13 Vict. c. 106, to do so:—

Held, upon appeal, that “such extended time” mentioned in the section meant “further or longer time,” not exceeding fourteen days; and that the notice having been given within the seven days every thing was *in fieri*, and the commissioner had authority to grant the application. The matter was, therefore, sent back to the commissioner. *Castelli*, in re, 280.

BENEFICIAL INTEREST.

See WILL.

BILL FOR DISCOVERY.

See DISCOVERY.

BREACH OF TRUST.

See TRUST.

CALLS.

See WINDING-UP ACTS.

CASES OVERRULED, &c.

<i>Holmes v. Turner</i> , 7 Hare, 367, note, overruled,	.	.	.	.	249
<i>Smeathman v. Bray</i> , 15 Jur. 1061; 8 Eng. Rep. 46, overruled,	.	.	.	.	249

 Chancery.

CERTIFICATE

See BANKRUPTCY.

COALS.

See SPECIFIC PERFORMANCE.

COMPOSITION.

Of Another's Debts.]

See SPECIFIC PERFORMANCE.

COMPANY.

See WINDING-UP ACTS.

CONTRIBUTORY.

Upfill's Case.] A member of the provisional committee of an association to form a railway company which failed, applied by letter, begging that fifty shares might be allotted to him. The shares were not allotted. He took no part in any of the proceedings, nor attended any of the meetings:—

Held, that he was not a contributory, the circumstances being in these respects different from *Upfill's case*. *Conway's Case*, 250.

CONTRACT.

Ambiguity in.]

See SPECIFIC PERFORMANCE.

CORPORATION.

See PARTIES. WINDING-UP ACTS.

COSTS.

1. *Costs of Action improperly brought.]* The taxing master has, under the Solicitor's Act, 6 & 7 Vict. c. 73, a discretion to disallow costs he may think unduly claimed. *Clarke*, in re, 87.
2. The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion. *Ib.*
3. *Attorney and Client.]* An attorney is clearly responsible, unless acting on the opinion of counsel. *Ib.*
4. *Costs of Appeal when Judges of this Court differ.]* *Semble*, where, on appeal to this court, the judgment below is affirmed, in consequence of a difference of opinion between the judges, the costs will follow the result. *Ib.*
5. *Next Friend.]* A next friend, substituted for one who has previously died, is liable for all the costs from the commencement of the suit, and not only for such as have been incurred during the time his name has been on the record. *Bligh v. Trodgett*, 79.
6. *Semble*, a next friend, appointed without his own knowledge, is liable, as between himself and the defendants, to all the costs of the suit, and has a remedy against the solicitor who appointed him. *Ib.*

Chancery.

7. *Alleged Contributory.*] In appeals under the joint-stock companies winding-up acts, this court is not bound by the existing practice in chancery, of not giving a successful appellant the costs of the appeal; but has, under the 104th section of the 11 & 12 Vict. c. 45, a discretion as to the costs of the appeal, and also as to all previous costs. *Hall, ex parte*, 51.
8. *Official Manager.*] Official managers who succeeded before the master, and also before the inferior court in placing and retaining a person on the list of contributories, but who failed upon the contributory's appeal to the Lord Chancellor, ordered to pay the costs of the appeal, and all previous costs. *Ib.*

See LUNATIC. PRACTICE. WILL.

DEED.

See GIFT.

DEMURRER.

See INJUNCTION. WASTE.

DIRECTORS.

When necessary Parties.]

See PARTIES.

DISCOVERY.

1. *Title—Fraud in obtaining an Order for the Conveyance of an outstanding Legal Estate.*] Bill by A, claiming to be heir at law of C, against B, also claiming to be heir at law of C; alleging that B had presented a petition to this court under Sir E. Sugden's Act, and had obtained a conveyance of the outstanding legal estate to him, as the heir at law of C; and alleging that the evidence and statements presented by the defendant to the master, upon the faith of which the master was induced to report (contrary to the fact,) that B was the heir at law of C, were false and fraudulent; praying a declaration that B was a trustee of the legal estate for him, and that he should be restrained from using it against him. The bill contained various interrogatories, addressed to the discovery of the alleged false and fraudulent evidence and statements. The defendant, by his answer, denied A's title, and he refused to answer any of the interrogatories relating to the evidence and statements produced before the master, on the ground that he could not give that discovery without disclosing the evidence of his own title; but he denied that any of such evidence or statements were either false or fraudulent, or that they would prove any of the allegations in the bill:—

Held, affirming the decision of the late Master of the Rolls, allowing exceptions to the answer, that B was not protected from the discovery, which was required as a means to establish the fraud averred in the bill, although incidentally, B may have to disclose his own title. *Stainton v. Chadwick*, 105.

2. *Materiality of Discovery of Relief prayed—Exceptions for Scandal to material Discovery overruled.*] A, B, and C, were partners. A died, having bequeathed his residuary property to G. S. and H. S. equally. H. S. thereupon assumed to act as partner in the place of A, and employed the assets in the business. A bill was filed by G. S. to administer A's estate, and for an account of the assets employed by H. S. in the business. The bill alleged that the partnership was now to be wound up, denied the right of H. S. to be a partner, and stated that B, another of the partners, had been, since some time before A's death, imbecile, and incapable of transacting business. This last statement, and the interrogatories founded upon it, being excepted to:—

Held, that B's state of mind during this time was a material fact in considering whether

 Chancery.

H. S. was properly a partner, and whether it was possible now to wind up the partnership business. The exceptions were overruled. *Simpson v. Chapman*, 48.

DIVIDENDS.

Order on Trustee to receive.]

See TRUSTEE ACT.

DUTY.

See LEGACY DUTY.

EASEMENT.

See INJUNCTION.

EQUITABLE MORTGAGE.

See HUSBAND AND WIFE.

EXCEPTIONS.

For Scandal.]

See DISCOVERY

EXECUTORS.

See INSOLVENCY.

EVIDENCE.

To control a Written Agreement.]

See STATUTE OF FRAUDS.

Privileged Communications.]

See PRIVILEGED COMMUNICATIONS.

FEME COVERT.

See ATTACHMENT.

FORECLOSURE.

1. *Two Mortgages.*] A mortgagee, having separate mortgages created by the same mortgagor on two different estates, has not a right to foreclose both estates on non-payment of the aggregate amount of debts, but can only foreclose each separately on non-payment of what is secured upon it. *Smeathman v. Bray*, 46.
2. *Form of Order — Inquiry — Incumbrances.*] Where foreclosure is sought by claim, an option is given to the plaintiff, at the hearing, to take either the common order for foreclosure, or an inquiry as to the existence of other incumbrances, suspending the order for foreclosure till after the report. *Ib.*
3. *Parties — Mortgagees.*] Upon a claim by an equitable mortgagee against a mortgagor, asking for a sale, and also that the several other mortgagees might be summoned before the master, or that a decree might be made to ascertain what mortgages there were, and their priorities, the court refused the order. *Burgess v. Sturgis* 270.

Chancery.

FRAUD.

See DISCOVERY.

FRAUDS, STATUTE OF.

See SPECIFIC PERFORMANCE.

GIFT.

Deed — Voluntary Conveyance — Baron and Feme — Constructive Trust.] G. P. executed a document which was attested by two witnesses, giving and granting to E. P. his wife a freehold house in which they resided. G. P. afterwards died, without having made any will, and his heiress at law brought an action of ejectment to recover the possession of the house and premises from E. P. and obtained a verdict; upon which E. P. filed this bill. Upon a motion to dissolve an injunction which had been obtained:—

Held, that the gift was incomplete; that the relationship of trustee and *cestui que trust* was not created; that this court would not assist either party, but leave them as it found them; and that the injunction must be dissolved. *Price v. Price*, 271.

See HUSBAND AND WIFE.

GUARANTEE.

See SPECIFIC PERFORMANCE.

GUARDIAN.

To a Lunatic.]

See LUNATIC.

HUSBAND AND WIFE.

1. *Wife's Equity to a Settlement — Reversionary Chose in Action.*] A wife's equity to a settlement does not extend to include a reversionary interest in stock. The settlement of that fund cannot be asked for, until it falls into possession, that is, until the husband has a right (subject to this equity) to receive it. *Osborn v. Morgan*, 192.

2. *Gift by Husband to Wife.*] Previously to a marriage then in contemplation, the intended husband, by his agent, paid off two equitable mortgage debts of the intended wife, secured by a deposit of title-deeds belonging to her. He did this apparently to save the expense of a legal mortgage, which would otherwise have been required by the mortgagees. The title-deeds still remained in the custody of the mortgagees. The marriage was solemnized; there was no settlement, or agreement for a settlement. There was no issue of the marriage; the husband predeceased the wife, intestate. His widow took out administration to him:—

Held, that the husband did not intend to make a gift to the wife of the money which he had paid for her, and that the debt still existed on the security of the equitable mortgage in favor of the personal estate of the deceased husband. *Gooch v. Gooch*, 141.

See WILL. ATTACHMENT.

INFORMATION.

Attorney-General — Railway Company — Injunction — Completion of whole Line.] Where a railway company was authorized to make a direct line of railway, with a

Chancery.

branch railway, and were about to complete and open the direct line, but had abandoned the branch line, the Attorney-General has no right to file an information to restrain the opening of the direct line, as a means of compelling the completion of the branch line, alleging that the abandonment of the branch line was an injury to the public. *Attorney-General v. The Birmingham, Oxford, &c. Railway Co.* 248.

INJUNCTION.

1. *Legal Right acquired pending Injunction.*] Pending an injunction, which was granted upon the authority of a case that was ultimately overruled, the defendant acquired a statutory right as against the plaintiff:—
Held, that upon dissolving the injunction, the court would not impose terms upon the defendant which would have the effect of depriving him of his right so acquired. *South Staffordshire Railway Co. v. Hall*, 229.
2. *Action—Stream.*] In granting an injunction after a plaintiff has established his right at law, the court is not guided by the amount of damages; the court will consider whether the injunction will afford the plaintiff the relief to which he is entitled, and will not grant it merely because the plaintiff has a legal right to the thing sought to be protected. *Wood v. Sutcliffe*, 217.
3. As to the right to use the water of a stream generally. *Id.*
4. *Railway Company.*] A company was authorized by three acts of parliament to make three distinct railways, (not forming one line,) with separate amount of capital for each. Another railway company was, by a fourth act of parliament, authorized to take a lease of the three lines, and did so; and the whole undertaking was placed under the control of a joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and the directors made calls for the purpose of entirely finishing the opened line, the other two being abandoned. An injunction was granted at the Rolls, restraining the application of money and the making of calls for any purpose not authorized by the three acts, excepting only for the purposes of ordinary repair:—
Held, on appeal, that on an interlocutory application, in the absence of the lessee company, the opened line being worked under the direction of the joint committee, the injunction must be dissolved. *Hodgson v. Earl of Powis*, 257.
5. *Power to restrain Parties from doing unlawful Acts—Want of Power to undo what has been done.*] The above-named railway company had become owners of a canal by purchase, and they were bound, by several statutes, to keep it open and navigable. The plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself; this fact was denied by the defendants, who built a wall across the bay, so as to make the canal of the same width there as in other parts. The plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them from doing more:—
Held, that the court could not make the defendants undo any thing done, but that the plaintiff was entitled to an injunction to restrain them from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right. *Bradbury v. The Manchester, Sheffield, and Lincolnshire Railway Co.* 143.
6. *Copyright.*] In 1844, the plaintiff purchased the English copyright of some musical compositions by Mendelssohn. In August of that year, the plaintiff published this music in England, and it was published simultaneously in Berlin. In 1849, there being then conflicting decisions on the question of foreign copyright in England, the defendant published the said music on his own account. The plaintiff thereupon gave the defendant notice to desist from such publication, or that he would take legal proceedings against him. The defendant paid no regard to such notice. The plaintiff delayed to proceed against him. In May, 1851, the Appeal Court of the Exchequer Chamber decided in favor of the foreign copyright. The plaintiff thereupon gave another notice to the defendant to desist, and, upon his disregarding it, filed this bill for an injunction. On motion the injunction was granted, and the plaintiff was put on terms to bring an action to try his right, if the defendant required him. *Buxton v. James*, 155.

Chancery.

7. *Bill to restrain the Registration of Shares — Demurrer — Multifariousness.*] The directors of a provisionally registered company purchased a lease of a mine, for 2000 shares, to be considered as paid up, from the defendant S., acting on behalf of himself and the plaintiff. The lease was assigned to trustees for the company, and 2000 free shares were allotted to S. in his own name. The company was completely registered, but S. never executed the deed of settlement, or registered as a shareholder in respect of these shares. S. had made advances on the shares for the plaintiff, and had brought an action for the same. A bill by the plaintiff against S. and the company, for specific performance and delivery of sealed certificates, and to have the accounts between S. and the plaintiff, in respect of the advances taken, and the action stayed, and also for an injunction to restrain any execution of the deed or registry as to these shares, was demurred to by the company for want of equity, and multifariousness: —

Held, that the company were bound to register and deliver sealed certificates to the plaintiff in respect of his 1000 shares; that the company were trustees for that purpose; and that the bill was not multifarious. *Fyfe v. Swaby*, 184.

8. *Injunction.*] On motion for an injunction, it appeared that S. had refused to deliver to the plaintiff his shares, alleging fraud on the part of the plaintiff in the projection of the company, and that the mine was worthless, and that S. had exchanged the 2000 free shares for others. Injunction granted (on payment of the balance of advances into court,) to restrain S. from executing the deed of settlement, or registering the 2000 shares, and to restrain the company from allowing any such execution or registry. *Ib.*

See INFORMATION. WASTE.

INSOLVENCY.

1. *Policies of Insurance — "Executors and Administrators."*] By a postnuptial settlement, in 1810, R. M. settled the moneys to become payable on three policies of insurance on his life, upon trust for B. M., his wife, for life; and after her decease, upon trust for his appointees; and in default of appointment, in trust for the children of the marriage; and he covenanted to keep up the policies. In 1821, R. M. appointed that, after the death of B. M., the moneys should be made over to his *executors and administrators*. By a subsequent order of this court, in 1821, the trustees were directed to sell the policies to the insurance office, and to bring the money into court to be invested, the dividends to accumulate during the joint lives of R. M. and B. M. In 1828, R. M. took the benefit of the Insolvent Debtors Act. In 1845, R. M. became bankrupt, and obtained his certificate. In 1847, B. M., the wife, died. In 1850, the children of the marriage presented a petition, praying that they, who were next of kin at the date of the appointment, might be declared entitled to the fund, and for payment, or that it might be accumulated till the death of R. M. An order was then pronounced, by the late Vice-Chancellor of England, in the latter alternative. The assignees in bankruptcy appealed from that order, and the assignee in insolvency, who had not been before the court, presented a petition to discharge that order, and for payment of the fund: —

Held, reversing the decision of the Vice-Chancellor, that the effect of the appointment was to make the property a part of the persons' estate of R. M., subject to the life-interest of B. M.; and that neither the next of kin of R. M. were designated by the appointment, nor were the executors or administrators to take beneficially. *MacKenzie v. Mackenzie*, 67.

2. Observations as to the nature of the interests which the children of the marriage took under the settlement, and the appointment. *Ib.*

INSURANCE.

See INSOLVENCY.

 Chancery.

JOINT-STOCK COMPANIES.

See WINDING-UP ACTS.

JURISDICTION.

See TRUSTEE ACT.

LEASE.

See SPECIFIC PERFORMANCE.

LEGACY.

See WILL.

LEGACY-DUTY.

A testator devised his real and personal estates subject to the payment of a clear yearly rent-charge or annuity of 100*l.* to S. G.:—

Held, that the legacy-duty was chargeable on the testator's estate, and that the annuitant took the annuity free of legacy-duty. *Bailey v. Bolt*, 51.

LUNATIC.

1. *Guardian ad Litem to, without Commission.*] Guardian *ad litem* to lunatic defendant (not so found by inquisition) appointed without a commission. *Piddocke v. Smith*, 95.
2. *Costs of Inquisition on a successful Traverse.*] A person found lunatic by inquisition may traverse as a matter of right. *Loveday*, *ex parte*, 235.
3. On a successful traverse, the costs of the parties suing out the commission will not be allowed as a matter of course out of the property of the alleged lunatic. *Ib.*
4. On the contrary, unless a grant has actually been made under the prior inquisition, or unless there is property belonging to the alleged lunatic in the hands of the court, the court has no jurisdiction to allow such costs, either under the 6 Geo. 4, c. 53, or otherwise. *Ib.*

MARRIED WOMEN.

See ATTACHMENT.

MINERALS.

See SPECIFIC PERFORMANCE.

MISTAKE IN LAW.

See SPECIFIC PERFORMANCE.

MOIETY.

See SPECIFIC PERFORMANCE.

Chancery.

MORTGAGE.

1. *Mortgagor and Mortgages — Transfer of Mortgage — Tacking.*] A mortgaged an estate, X, to B for 200*l.*, and an estate, Y, to B for 1200*l.* This latter mortgage was transferred to a trustee for C. Then A made a further charge of 400*l.* upon both X and Y in favor of B; and afterwards D contracted to purchase Y of A for 1500*l.* and to have the benefit of the mortgage to C in the mean time, paying her off with 1200*l.*, part of the 1500*l.*, "in discharge of her said mortgage," but stipulating to have the full benefit of her mortgage security. On a bill filed by A against B and D for payment or foreclosure:—

Held, reversing the decree below upon both points,

First, that the 1200*l.* debt was not so extinguished by the payment by D to C as to deprive D of his priority on the estate Y.

Secondly, that D could not redeem B's interest in the estate Y on payment of 400*l.* only, but must pay the debt of 200*l.* as well. *Watts v. Symes*, 247.

2. *Holmes v. Turner* and *Smeathman v. Bray* overruled. *Ib.*

Foreclosure.]

See FORECLOSURE.

MOTIONS.

See PRACTICE.

MULTIFARIOUSNESS.

See INJUNCTION.

NEXT FRIEND.

When liable for Costs.]

See COSTS.

PARTNERSHIP.

See DISCOVERY.

PARTIES.

1. *Persons in interest.*] An administration claim was filed by an executor against his co-executors only, without making any person beneficially interested a defendant:—*Held*, that one at least of the persons beneficially interested must be made defendant to such a claim in the first instance. This would be necessary where the claim was to administer personal estate only, and *a fortiori* where it seeks administration of both real and personal estate. *Leslie v. Smith*, 97.

2. *Directors — Winding-up Act.*] On demurrer to a bill filed by a shareholder in a projected company, on behalf of himself and all other shareholders except the defendants, who were called "the finance committee," stating that he and other shareholders had paid their deposits, that the finance committee had the sole control, and that 1*7s.* 6*d.* had been repaid on some of the shares, and praying an account and an apportionment of the surplus between the plaintiff and the other shareholders:—

Held, that no directors were necessary parties; that all the shareholders need not be parties; that those who had not received back the 1*7s.* 6*d.* were not necessary parties; and that the plaintiffs were not bound to proceed under the Winding-up Act. *Clements v. Bowes*, 238.

 Chancery.

PERSONALTY.

What is.]

See WILL.

POWERS.

Defective execution.]

See WILL.

PRACTICE.

1. *Motions.]* A motion not made when called on is to be treated as an abandoned motion. *Turner v. Turner*, 137.
2. *Right to Begin.]* Where there are two petitions appealing from an order, one to the effect that no relief ought to have been granted, and the other that a greater measure of relief ought to have been granted, it is more convenient that the petition asking the relief should be opened first. *Neate v. Pink*, 205.
3. *Motions.]* Where several counsel state that they have respectively pressing motions to make, the court calls on the senior counsel. *Sollau v. De Held*, 132.
4. Where notice of motion has been given for a certain day, that motion does not thereby obtain precedence on that day. *Ib.*
5. *Semble*, on the last day of term only unopposed motions by the outer bar take precedence. *Ib.*
6. *Setting down amended special Case.]* After a special case had been set down for hearing, and before it came on to be heard, a tenant in tail of the property to which the case related was born, who was a necessary party to the case. On motion *ex parte*, an order was made to discharge the order to set down the original case, and to set it down again amended, by adding the infant tenant in tail as a party, and that it should keep its place in the paper, fresh appearances being entered for all the defendants. *Thistlethwayte v. Garnier*, 204.
7. *Next Friend—Costs.]* A bill was filed by a married woman concerning her separate property, in the name of a next friend, who had died two days before the bill was filed. About fifteen months afterwards her solicitor substituted B as her next friend, without his knowledge. A year later the bill was dismissed for want of prosecution, and costs. Notice of this motion to dismiss the bill was served on the plaintiff's agent, and by him sent by post to B, but not in time to enable him to appear on the motion. This was the first intimation that B received of the existence of the suit. The solicitor of the married woman had become insolvent, and had absconded to America. B moved, without serving the solicitor personally, or by substitution, with notice of the motion, to vary the order dismissing the bill with costs, by ordering that the solicitor should pay the costs. This motion was refused, with costs. *Bügh v. Tredgett*, 79.
8. Applications under the 10 & 11 Vict. c. 96, and the 12 & 13 Vict. c. 74, must be by petition, and not by motion. *Harrison v. Masselin*, 64.
9. *Dismissal of Bill against useless Defendant—Costs.]* A bill was filed against several defendants for the recovery of certain small tithes; one of these defendants being a quaker, his solicitor applied to the plaintiff's solicitor to dismiss the bill against him, and to proceed to recover the tithe from him under the 3 & 4 Will. 4, c. 74. The plaintiff consented, on condition that the defendant would admit the plaintiff's title to the tithe, so as to bring the case within the statute. The defendant prepared an answer not admitting the title. Subsequently by arrangement, the answer was revised, so as to admit the plaintiff's title. Proceedings were then taken against the defendant to obtain a warrant of distress under the above statute. Before the magistrates the defendant again refused to admit the plaintiff's title, but his admission in his answer being read, the warrant was granted. The plaintiff now moved to dismiss the bill against this defendant, without costs, and that the defendant

Chancery.

might pay the costs of the motion: — His honor made an order, dismissing the bill, without costs, but refused to give any costs of the motion. *Wright v. Barlow*, 125.

10. Where a suit becomes useless against a particular defendant, it is a laudable course for the plaintiff to dismiss the bill against him, and he may incur censure if he brings the suit to a hearing without doing this. *Ib.*

See ATTACHMENT. FORECLOSURE. LUNATIC.

PRECATORY WORDS.

See WILL.

PRIORITY.

See WILL.

PRIVILEGED COMMUNICATION.

1. A bill was filed by one of two residuary legatees, to set aside the purchase by the executors of certain shares of a ship, which were part of the testator's assets. The defence was, that the purchase by the executors was made at the special desire of the residuary legatees, who sent their solicitor to the executors to overcome their objections to make the purchase. The defendants examined the solicitor to prove these facts. An objection being made to his depositions, they were suppressed, as being in violation of professional confidence. *Lodge v. Prichard*, 121.
2. In a suit by next of kin of a testator, challenging a residuary gift made by his will to his executors, on the ground that it was made on a secret trust for an illegal purpose, which the executors had promised to perform, the court held, that communications had between the testator and the solicitor employed by him to prepare the will, with reference to the will and the trusts thereof, were not privileged; but that communications with reference to the will and the trusts thereof, had after the death of the testator, between the solicitor and the executors, who had continued to employ him as their solicitor, were privileged. *Russell v. Jackson*, 89.
3. The rule, that communications between solicitor and client are privileged, does not in the absence of an illegal purpose by a testator, apply to communications had between him and his solicitor with reference to the dispositions contained in his will; nor will such communications be protected, on the ground that they may lead to the disclosure of an illegal purpose entertained by the testator. *Ib.*
4. The rule of privilege protecting confidential communications does not extend to communications between the solicitors of opposite parties. *Gore v. Harris*, 147.
5. *Demurrer by Witness to Interrogatory, on the Ground of Privilege.*] A bill was filed to set aside a deed, on the ground of alterations having been improperly made in it after execution. A defendant examined the solicitor of a plaintiff as a witness to prove communications between them, showing that the solicitor was aware of the alteration of the deed. To the interrogatory on this point the witness demurred, because he alleged that it inquired about matters only known to him as solicitor for the plaintiff: —
Held, that this could not protect him from the necessity of disclosing his communications with the defendant. *Ib.*

PRODUCTION OF DOCUMENTS.

1. Where an answer, admitted to be sufficient, does not admit the possession, &c., of certain documents, no allegation of falsehood or fraud will, at a subsequent stage of the suit, entitle the plaintiff, on motion, to obtain the production of such documents;

Chancery.

the remedy under such circumstances must be either by criminal proceedings, or by a new bill. *Reynell v. Sprye*, 35.

PROCHEIN AML

When liable for costs.]

See COSTS.

PROFESSIONAL COMMUNICATIONS.

See PRIVILEGED COMMUNICATIONS.

RAILWAY COMPANY.

See INFORMATION.

REGISTRATION.

Bill to restrain.]

See INJUNCTION.

RELEASE.

See SPECIFIC PERFORMANCE.

REPLEVIN.

Costs on.]

See COSTS.

RESIDUARY LEGATEES.

See WILL.

SECURITIES.

When to be given up.]

See SPECIFIC PERFORMANCE.

SHAREHOLDERS.

See PARTIES.

SHIFTING CLAUSE.

See WILL.

SCANDAL.

See DISCOVERY.

SOLICITOR'S ACT.

See COSTS.

SOLICITOR AND CLIENT.

See PRIVILEGED COMMUNICATIONS.

Chancery.

SPECIFIC PERFORMANCE.

1. *Composition on Another's Debts — Release by a given Day.*] An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered into with such creditors only as actually signed before that day, and cannot be enforced in favor of a creditor who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified. *Emmett v. Dewhirst*, 83.
2. *Mistake in Law — Right to retain Securities.*] Where such an agreement contained no stipulation for giving up securities, a creditor declined to sign the release till the result of an action, brought by him against the acceptor of certain bills which he had discounted for the debtor, should be known: the guarantee insisting on the delivery of the bills, the settlement was postponed, and the release was not signed within the time specified by the agreement: —
Held, upon a bill filed by the creditor for specific performance of the agreement, that although both parties were under a misapprehension, the creditor being entitled to retain the bills, and although his failure to sign the release arose from such misapprehension, the creditor was not entitled to relief. *Ib.*
3. *Statute of Frauds, Sect. 4.*] *Held, obiter*, that such an agreement, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement. *Ib.*
4. *Ambiguous Agreement — Undivided Moiety.*] A contract for a lease of "Coals, &c.," or "Minerals," is too ambiguous to be carried out by this court. *Price v. Griffith*, 72.
5. A contract by the owner of one undivided moiety of a colliery, for a lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specially carried out as to his own moiety, either with or without compensation. *Ib.*
6. *Semble*, in such a case the parties will be left to damages at law. *Ib.*

STATUTES CITED, EXPOUNDED, &c.

6 & 7 Vict. c. 73	37
10 & 11 Vict. c. 96	64
12 & 13 Vict. c. 106	280
12 & 13 Vict. c. 74	64
12 & 13 Vict. c. 106, s. 257	283

TACKING.

Of Mortgages.]

See MORTGAGES.

TAXING MASTER.

See COSTS.

TENANT FOR LIFE.

See WASTE.

TIMBER.

See WASTE.

TRUSTEES.

Construction of Sect. 32 of the Trustee Act, 1850 — "Existing Trustees."] All the

Chancery.

trustees of a will declined to act, and did not act or take upon themselves the trusts of the will. A petition was presented for the appointment of certain persons as trustees "in the place or stead of" the trustees so declining to act, who appeared by counsel, and disclaimed:—

Held, that the disclaiming trustees were, nevertheless, "existing" trustees, so as to authorize an order appointing the new trustees in their "place or stead," within the meaning of the 32d section of the above act. *Tyler's Trust*, in re, 96.

TRUSTEE ACT, 1850, s. 23.

1. "Sole Trustee"—*Construction*. Two representatives of a sole trustee, deceased, in whose name a sum of stock was standing, refused, for more than twenty-eight days after request in writing, to receive the dividends:—

Held, that the court had power to vest the right to receive these dividends in the petitioner, under sect. 23 of the Trustee Act, 1850, although that section seemed to apply in words only to the case of a sole trustee so refusing. *Hartnall's Will*, in re, 172.

2. *Held*, also, that the order might be made to refer to arrears of dividends as well as future payments. *Ib.*

TRUST.

1. *Liability of Trust Property*.] A testator appointed an executor, with power to manage, conduct, carry on, and improve his estate. The property consisted of a moiety of an estate in Jamaica. The trustee took a lease of the other moiety, and managed the whole for the trust estate:—

Held, that although the taking of this lease was not authorized by the will, yet that, under the circumstances of this case, the acquiescence of the *cestui qui trust*, and otherwise, the trust estate was liable for arrears of rent and dilapidations. *Neate v. Pink*, 205.

2. *Breach of Trust*.] By indenture of 1821, six policies on the life of the father were declared to be held on trust for such one or more of eight daughters, or of the issue of any of them, as the father should by deed or will appoint; but the declaration of trust was not executed by the trustee. In October, 1832, the father executed an appointment of all the bonuses then declared on two of the policies, to three of the daughters absolutely; and then he and the three appointees directed those bonuses to be surrendered to the office, and the price of them, or the greater part of that price, applied for the purpose of keeping all the six policies on foot. Part of the price was applied in paying a debt of the father's; the remainder went to the three appointees, for their own purposes. In December, 1832, the father appointed the sums mentioned in the same two policies to certain others of his daughters, for the apparent purpose of equalizing the shares. A suit was instituted in 1833 for the purpose of appointing a new trustee; but these facts were not then stated to the court:—

Held, on a bill filed in 1842 by two of the daughters, who were not *sui juris* in 1832, for the purpose of setting aside the appointment of October, 1832,

First, that the transactions amounted to a clear breach of trust. *Harrison v. Randall*, 210.

3. *Two Appointments*.] Secondly, that the two appointments, of October and December, forming part of one transaction, must stand or fall together. *Ib.*

4. *Bill dismissed*.] Thirdly, the bill was dismissed, with costs, with liberty to the plaintiffs to file such other bill as they might be advised. *Ib.*

See GIFT. WILL.

USURY.

Friendly Societies.] The Frugal Investment Association was formed in 1845, and

Chancery.

was certified under the 4 & 5 Will. 4, c. 40. Its objects were to advance the society's funds to its members, and to accumulate them, and to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, and the member offering the highest premium for it was entitled to that share, and as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken, he was to pay the premium agreed upon, and also 8s. a month for 100 months (during which time only the society was to exist) as redemption money; and on these conditions he might have an immediate advance of 100*l.*, the full value of his share, on giving security for the repayment of it, together with such premium and redemption money. He was also entitled to participate in the general profits of the society. B. became a member, and obtained an advancement of five shares at premiums of 71*l.* for three, and 73*l.* for the other two; and he gave security as required, and received an advance of 500*l.* B. died, and on the society pressing for payment of the moneys so secured to them, B.'s executrix filed a bill against them, alleging that the transaction was usurious and the society illegal, and claiming to redeem the security on repayment of the 500*l.*, with legal interest only:—

Held, that the transaction, being between partners, was not usurious. *Burbidge v. Cotton*, 57.

WASTE.

1. *Timber—Money in Court—Accumulations, Right to—Settled Estates.*] Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court; this, with the accumulations, amounted to 26,133*l.* 2s. 10*d.* Two of the tenants for life died without issue; H. L. attained twenty-one, and being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations: which were ordered to be transferred to him. *Lushington v. Boldero*, 265.
2. *Demurrer—Injunction to restrain Tenant for Life without Impeachment of Waste from cutting Timber, where Trustees had Power inconsistent with his Right, and to which it was expressly made subject.*] In 1832, certain estates, of which A was tenant for life, with remainder to his son B in tail, and certain other estates to which A was entitled in fee-simple, were settled, subject to certain charges, to trustees, upon trust to pay the rents (after paying the interest of mortgages,) to A during the joint lives of himself and B, and if B died in A's life, to pay an annuity to B's wife, and, subject thereto, to pay such clear rents to A for life; but if A died in B's life, then to stand seized of the estates to the use of B for life without impeachment of waste, (but subject to the power thereafter limited to the trustees or trustee thereof to fell timber and underwood growing on the said hereditaments,) with remainder, subject to an annuity to B's wife, to his first and other sons in tail, with remainder to the heirs of A; and in the settlement was contained a power to the said trustees, or the survivor of them, at any time thereafter, so long as there should be any mortgage or incumbrance subsisting on the said hereditaments, (but not after A's death, without the consent of B, to be signified in writing,) to cut all or any of the timber and underwood on the said estates, and to sell the same, and apply the proceeds in or towards the discharge of the subsisting mortgages or incumbrances, in manner therein mentioned. A died in B's life. After A's death, the surviving trustees filed a bill against B and the other persons interested under A's will, and otherwise in the estate, stating the above facts, and that a considerable quantity of timber had been cut down and sold for the purposes of the trust, and that the trustees, in exercise of their discretionary power, had entered into various contracts for sale to various persons of certain timber, &c., which had been cut and carried away, and that part of the purchase-moneys had been paid, but the remainder, though due, had not been received by the trustees, for the reasons after mentioned; that B had claimed the right to cut timber, and had given notice that he would not consent to the trustees selling more, and had also given notice to the purchasers from them not to pay the

Chancery.

purchase-money to the trustees, and that the plaintiffs were thereby prevented from receiving the purchase-moneys; and the bill prayed a declaration, that, by the construction of the settlement, the trustees had, during the existence of any mortgage or incumbrance on the said estates, a discretionary power, with the consent of B, to cut and sell all or any of the timber for the purpose of applying the proceeds in liquidation of such mortgages or incumbrances, and that the right of B was subordinate to their right; and for an injunction to restrain B from cutting or attempting to cut any such timber on the said estates, or from disposing thereof, so long as any such mortgage or incumbrance should be subsisting; and from receiving or attempting to receive, or applying to his own use, the proceeds of any timber already sold by him; and from doing, or attempting to do or continue, any act to prevent the plaintiffs from receiving any of the purchase-moneys payable under their said contracts, or any other proceeds of such timber.

Upon demurrer to this bill, it was *held*, that the allegations were sufficient to support the prayer for a declaration of the rights of the trustees, and to have the trusts executed by the court, if not for the injunction; and if that were an unnecessary part of the prayer, that would be a question of costs; and the demurrer was overruled. *Briggs v. Earl of Oxford*, 194.

3. Upon motion the injunction was granted, it being *held*, upon the construction of the settlement, that the scheme of it was that the timber should be used to relieve the inheritance of the charges upon it, and that for this purpose the power given to the trustees was expressly made paramount to the privileges of the tenant for life, without impeachment of waste to cut the timber, and that his consent was made necessary to enable him to regulate the mode of exercising the power. *Ib.*

WATERCOURSE.

See INJUNCTION.

WELL KNOWING.

Effect of such words in a Will.

See WILL.

WILL.

1. *Annuity, whether Perpetual or for Life.*] Bequest to Y. of "one clear annuity of 100*l.* per annum, for and during his natural life; and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother:"—

Held, reversing the decision of the late Vice-Chancellor of England, that the child of Y. did not take a perpetual annuity, but for life only. *Yates v. Madden*, 178.

2. *Held*, also, that the direction as to payment, "to be paid to his or her mother," did not cut down the annuity to the minority of the child. *Ib.*

3. *Construction of Executory Bequest in Case of a Legatee dying before "being entitled in Possession."*] The will of the testator in this matter contained a bequest of 25,000*l.*; to trustees, upon trust to invest the same, and to pay the interest to his daughter for life, and from and after her decease, to pay the principal unto and amongst all her children equally, share and share alike, if more than one, and their respective executors, administrators, and assigns; and if but one, to that one, his or her executors, administrators, and assigns, "on the respective attainments of such children to the age of twenty-one years being sons, or on their respective attainments to that age, or day or days of marriage, being daughters;" the interest of their respective shares from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance: and in case any of the children of his said daughter "should happen to die before being entitled in possession to his, her, or their share or shares" under the will, the share of the child so dying was to go to the survivors or survivor of them. The daughter had two children only

Chancery.

who attained twenty-one, the rest having died under age, and unmarried. One of these two children survived the testator, but died in the lifetime of her mother:—
Held, that the gift over did not take effect, but the personal representatives of the deceased child were entitled to her share. *Yates*, in re, 224.

4. *Trust—Precatory words “well knowing.”*] A testatrix gave various charitable and other legacies, and gave to S. P., whom she appointed sole executrix, 3000*l.*, and a like sum of 3000*l.*, in addition, for the trouble she would have in acting as executrix. She then made other bequests, and then gave all the rest, residue, and remainder of her personal estate to S. P., her executors, administrators, and assigns, “well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes”:—

Held, affirming a decision below, that the executrix did not take the residue beneficially. *Briggs v. Penny*, 231.

5. Words accompanying a bequest expressing confidence, belief, desire, or hope, as to the application of the bequest, will create a trust, when they exclude all discretion in the donee, the subject is certain, and the objects definite. *Ib.*

6. *Construction—Perpetual Annuity.*] A testator, by his will, gave to E. L., “50*l.* per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty; but if either of them die, to be paid to the survivor”:—

Held, affirming a decision of the Master of the Rolls, that the bequest was of a perpetual annuity. *Potter v. Baker*, 262.

7. *Class—Lapse—Trustee Act.*] A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster, and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator:—

Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Biles*, ex parte, 99.

8. *Costs.*] Costs borne by the shares which went to the residuary legatees. *Ib.*

9. *Devise of Real Estate upon Trust to be Sold—Devisee takes as Personalty.*] In 1822, a testator, by his will of that date, devised his real estate to trustees, upon trust, after the decease of his wife, to receive the rents during the life of his son, M., and to apply the same for his benefit during his life; and from and immediately after the decease of his said son, upon trust to sell, and the net proceeds of such sale he directed to be applied “in manner hereinafter mentioned.” If it should be more to the interest of his estate that the said estates, or any part thereof, should be demised during his son’s life, then the testator directed the trustees to demise the same during his said son’s life. Then, after bequeathing certain legacies, the testator directed the said trustees to invest all moneys due to him, and all other his moneys, and to apply the income of his capital stock or fund for the maintenance of his said son’s children, and, on their severally attaining twenty-one, to pay, assign, transfer, and “convey the aforesaid capital stock or fund, estate, and effects” to such children; and in case they should all die under age, and without leaving issue, upon the further trusts therein mentioned. The testator died in 1824. His widow died in 1834. M., the son, died in 1850, a bachelor:—

Held, that the trust for sale was absolute, and the property must be considered as personality, and the son of the testator, in the events that had happened, took it as personality, if he took it at all, as heir of the testator. *White v. Smith*, 77.

10. But *quære*, whether the gift over on failure of issue of the son did not take effect; and *quære* also whether any beneficial interest in the produce of the real estate was given by the will after the death of the son? *Ib.*

11. *Construction of—Annuities.*] A testator gave his estate to trustees, upon trust to invest, and out of the dividends to pay two life annuities to his daughter, and other annuities to other relatives; he also gave certain legacies:—

Held, upon the construction of the will reversing the decision of the court below, that the estate proving deficient, the annuities were not entitled to priority over the legacies, but must abate ratably; and that they were not to be paid out of the *corpus* *Müller v. Huddleston*, 26.

Chancery.

12. *Priority.*] In deciding upon questions of priority under a will, the mere circumstance of relationship to the testator is not entitled to much weight; it constitutes but an auxiliary reason for giving priority, where the words used in the will favor the notion of priority to a sufficient reason. *Id.*
13. *Shifting Clause — Construction.*] A testatrix, by her will, devised certain real estates to the use of M. J. for life; with remainder to the use of the sons and daughters of M. J. successively in tail; with remainder to the use of S. M., daughter of J. M., for life; with remainder to the first and other sons of S. M. in tail; with remainder to the daughters of S. M. as tenants in common in tail; with remainder to P. M., son of J. M., for life; with like remainders to the sons and daughters of P. M. in tail; with remainder to T. M., another son of the said J. M., for life; with like remainders to the sons and daughters of T. M. in tail; with divers remainders over: provided, that if P. M. and T. M., or either of them, their or either of their issue, or any other son or sons of the said J. M., or his or their issue, should become entitled to an estate of freehold or inheritance of possession of or in certain other real estates in Kent of or belonging to R. M., elder brother of the said J. M., "so as to be in the possession or in the actual receipt of the rents and profits thereof," then, and in that case, the said estates devised by her will should shift from the person so becoming entitled, in manner therein mentioned. At the date of the will, R. M. was entitled to real property in Kent in fee, and also in tail. These estates were subsequently disentailed and devised, and so came to the son of T. M., who was then entitled in possession to the other devised estates, by limitation as a purchaser, and not by inheritance, or under the original limitations existing at the date of the testatrix's will:—
- Held*, that this did not prevent the shifting clause from taking effect. *Monypenny v. Dering*, 42.
14. *Construction — Beneficial Interest.*] A testator, being possessed of real estate in England and Canada, by his will, made in England in 1801, devised all his estate to trustees, upon trust to sell, and to divide the net proceeds between his brothers and sisters and their children. In 1804, the testator went to Canada, and by a codicil made there in that year, he devised and bequeathed all his real and personal estate in Canada to other trustees resident there, upon trust to convert the same, and out of the proceeds to pay his debts in Canada, and legacies, and to remit the surplus to one of the trustees named in his will, to whom the testator gave all the residue of his estate and effects, in Canada or in Great Britain, nor otherwise disposed of by that codicil, or by his will then in England, to hold to him, his heirs, executors, administrators, and assigns for ever; and the testator thereby revoked every thing contained in his will which might be construed to be contrary to the above disposition of his said estates:—
- Held*, that this devisee took the surplus proceeds of the sale of the property in Canada beneficially. *Schofield v. Cahuac*, 55.
15. *Construction of Will — Remoteness.*] A testator gave his real estates to trustees, in trust to apply the rents for the benefit of his daughter M. and her children, born and to be born, until her youngest child should attain twenty-one, and on that event to pay her an annuity, and to pay the rents to all the children of his daughter, with benefit of survivorship if no issue, and the issue of any one who should die leaving issue, until the death of the longest liver of such children; and on that event he gave his estate at S. to such son of any of his grandchildren as should then be the eldest living grandson of his daughter; and he directed the residue of his real estate to be then sold, and gave the proceeds unto all his grandchildren, the children of his daughter, except such eldest grandson of his daughter who would be entitled to the S. estate. The testator's daughter had six children living at his death, and had none born afterwards:—
- Held*, that all the above gifts for the great-grandchildren of the testator were void for remoteness, and that by his grandchildren and children of his daughter, in the gift of the proceeds of the residue of his estate, he meant great-grandchildren. *Gooch v. Gooch*, 188.
16. *Powers — Defective Execution aided in Favor of Charities.*] J. I., having a life estate in 10,000*l.*, 3*l.* per cent. consols, and other sums of stock, with a power of appointment, by deed or will, over one third part thereof; and if by will, to be by her

Chancery.

signed and published in the presence of two or more witnesses; by her will, in 1833, which was unattested, and did not refer to the power, gave several sums of 3*l.* per cent. consols to various charities, amounting in the whole to 3,000*l.*; and she gave 500*l.*, 3*l.* per cent. consols, to H. K. I.; and "the remainder in the 3*l.* per cents." and other sums of stock, and any other sums of stock she might die possessed of, she left to her brothers, upon trust. The testatrix had neither at the date of the will nor at her death any sums of stock of her own upon which the will could operate:—

Held, affirming the decision of Wigram, V. C., first, that the testatrix intended by this will to execute her powers of appointment; and that, these being specific gifts, the state of the testatrix's property at the date of the will and at her death might be looked at. *Innes v. Sayer*, 157.

17. Secondly, that, notwithstanding that the power required the will to be signed and published in the presence of two or more witnesses, the will was a good execution of the power in favor of charities. *Ib.*

18. *Construction—Power of Sale—Charge of Debts.*] A testator, by his will, appointed A, B, and C to be his executors, in trust to dispose of his property in the following way: He then directed that all his debts should be discharged by his executors, and that the residue of his property, real and personal, should be disposed of by them at the time therein mentioned, save and except his estate at M., which he gave to A for life, and at A's death to be disposed of as aforesaid:—

Held, that A, B, and C had a power of sale of the estate of M.: and that it was not necessary for them to show that there were any of the testator's debts left unpaid. *Mather v. Norton*, 255.

19. *Construction—Persona designata—Second Husband.*] A testatrix gave the interest of certain money in the funds to her daughter Mary for life, and after decease the capital to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her daughter Mary. One of the daughters married a second husband, after the death of the testatrix, who was living at the death of the tenant for life:—

Held, that the testatrix meant to designate the particular husbands living at the time she made her will, and that the second husband was not entitled to a share of the trust fund. *Bryan's Trust*, 258.

WINDING-UP ACTS.

1. *Winding up—Claim.*] A solicitor who had been employed in the formation of a company, and had been employed by the company after it had been formed, carried in before the master, to whom the winding up of the company was referred, his bill for the whole period during which he was employed. The master allowed it as a claim:—

Held, that the court could not distinguish between that portion of the bill which related to business done before the company was formed, and the other; and the master's decision was not disturbed. *Terrell, ex parte*, 64.

2. *Solicitor—Personal Liability.*] The solicitor had agreed that no director should be personally responsible, and that the officers of the company should not obtain payment until a sufficient sum should be obtained by the funds of the company:—*Held*, nevertheless, that he could claim payment under the Winding-up Act. *Ib.*

3. *Reserved Bidding at Sale of Company's Property—Notice to Contributories.*] The master to whom the winding up of a company is committed has no discretion, under the above acts, to order the official manager to attend him for the purpose of fixing a reserved bidding, for the intended sale of the company's property, privately, without giving notice to the contributories, or allowing them to be present. *Imperial Salt and Alkali Company*, in re, 49.

4. *Petition for Winding-up Order—Company within the Acts.*] Two mining companies agreed to amalgamate upon certain terms, one of which was, that one company should pay to the other 1600*l.*, and should also provide working materials of the value of 1600*l.* for the mines of the other. This agreement was afterwards modified

Chancery.

by a new agreement, which provided for the security by promissory notes of the debts due from one company to the other. These promissory notes were not given, and there was a conflict of evidence as to whether the debt from one company to the other was ever in fact paid; but the amalgamated company carried on business, and made calls, which were partly paid. No profits were obtained from the mines, and at a meeting in September last it was proposed that the company should be wound up. This was approved by the majority of shareholders present, but negatived on the votes being taken, because one of the dissentients voted in respect of about 1700 shares. The company then ceased to carry on business, and actions were brought against some of the directors in respect of the company's debts. Of these actions due notice was given to the company, but they did not provide for them in any way. The landlord of one of these mines had also proceeded to recover the rent. On a petition for a winding-up order being presented:—

Held, that these circumstances brought the case within the Winding-up Acts; and the order was made accordingly. *The Pennant and Craigwen Consolidated Lead Mining Co.*, in re, 150.

5. *Call — Contributories — Costs.*] The Master to whom is committed the winding-up of an abortive association for the formation of a railway company, in an urgent case, may make a call, for costs incurred by the official manager for the common benefit of all the contributories, upon contributories clearly liable as such, although there may possibly be a certain class of them primarily liable, the question of prior liability being left to be afterwards determined. But it seems that such a call ought not to be made to pay the debts of the company until the question of primary liability is determined. *Gay*, ex parte, 173.

6. *Right of Contributories to attend Proceedings in the Master's Office.*] A contributory who has applied under sect. 38 of the Joint-stock Companies Winding-up Act, 1848, has a right (but at his own expense) to be served with notice of, and also to attend, all meetings in the Master's office in relation to the winding up of his company, even when there is strong ground for suspecting that his presence there may be mischievous to the estate. *Slattery*, ex parte, 133.

7. *Semble*, per Knight Bruce, L. J., that, in a suit, a party to the suit would, under such circumstances, be liable to be excluded. *Ib.*

8. *Petition to discharge Winding-up Order.*] In June, 1849, an order was made to wind up the above-named company under the above act, upon representations that the company was provisionally registered, and that shares had been applied for, but before they were allotted it had been deemed advisable to abandon the undertaking; that some shares had afterwards been allotted, on a few of which a trifling sum had been paid; that there were numerous contributories; that no deed of settlement had been executed; that large debts had been incurred, to which some of the persons liable had contributed something, but others had not; and that the company had ceased to carry on business. A petition was now presented to discharge this order, on the grounds that the association, by the law as it now stands, was not within either of the Winding-up Acts, because its object was only to form the company, which had never been effected, and because there were only seven persons who would now be considered contributories, one of whom was out of the jurisdiction:—*Held*, that the company was within the act of 1848, and the petition must be dismissed, with costs. *Woolmer*, ex parte, 128.

See PARTIES.

Common Law.

ABANDONMENT.

See POOR.

ABODE.

Meaning of, in 5 & 6 Will. 4, c. 76, s. 32 - 356.]

See ELECTION.

ACCORD AND SATISFACTION.

See PLEADING.

ACCOUNT STATED.

See PROMISSORY NOTE.

ACTION.

Contractor and Subcontractor — Contractor not liable for negligence.] A contracted to pave a district, and B entered into a subcontract with him to pave a particular street. A supplied the stones, and his carts were used to carry them. In the course of the work, B's men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff:—

Held, that A was not liable, and that the fact that the act complained of amounted to a public nuisance made no difference. *Overton v. Freeman*, 479.

Semble, if the contract of A with B had been to do what might in itself be a nuisance, A would have been liable. *Id.*

Matthews v. The West London Waterworks Company, 3 Camp. 403; *Bush v. Steinman*, 1 Bos. & Pul. 404; doubted. *Id.*

AGENCY.

See CORPORATION.

AFFIDAVIT.

Judgment as in the Case of Nonsuit.] An affidavit sworn on the 16th January, in support of a rule for judgment as in case of nonsuit, stated that notice of trial was given for the sitting after Michaelmas term preceding, and that the plaintiff did not proceed to trial in pursuance of his said notice:—

Held, sufficient. *Driscoll v. Whalley*, 355.

Edgar v. Halliday, 1 Lownd. M. & P. 367, overruled. *Id.*

Common Law.

AGREEMENT.

Between Railways.]

See RAILWAY COMPANY.

ALUM-MINES.

See COAL-MINES.

ALTERATION.

Of a Bill of Exceptions.]

See EXCEPTIONS.

APPEAL.

See EVIDENCE. POOR.

ARBITRATION.

3 & 4 Will. 4, c. 42, s. 39 — *Enlargement of Time for making the Award.*] A cause was referred to arbitration in 1846, after which both parties having delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award beyond Easter term, 1850, the court refused, under the 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time to Michaelmas term, 1852, the defendant refusing his consent to such enlargement. *Andrews v. Eaton*, 561.

See CARRIERS.

ARREST.

Vagrant Act, 5 Geo. 4, c. 83, s. 4 — *Apprehension of suspected Persons frequenting Streets and Highways.*] By sect. 4 of stat. 5 Geo. 4, c. 83, every reputed thief frequenting any river, canal, &c., or any quay, wharf, or warehouse adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond:—

Held, First, that the section applied to all streets and highways, (PATTESON, J., dissenting.) *Regina v. Brown*, 821.

Secondly, that a conviction which stated an intent to commit felony generally, was good. *Ib.*

See FALSE IMPRISONMENT.

ASSESSMENT.

Meaning of.]

See TITHES.

ASSIGNMENT.

Operating as a New Lease.]

See LANDLORD AND TENANT.

ATTESTATION.

By Attorney.]

See WARRANT OF ATTORNEY.

Common Law.

ATTORNEY.

Undertaking — Lien.] A, an attorney, on obtaining from B, another attorney, the papers belonging to a former client of B, wrote to B as follows:—"Out of any moneys which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due of your bill of costs as settled at 9l."—

Held, that A was bound upon this undertaking to pay over to B the amount of the costs due to him from the first moneys he should receive on account of the client, without deducting therefrom any costs that might be due to himself for recovering such moneys, or otherwise. *Tharrett v. Trevor*, 508.

See PRIVILEGED COMMUNICATIONS.

May Attest a Warrant of Attorney.]

See WARRANT OF ATTORNEY.

BAILMENT.

Determination of.]

See TROVER.

BANK-CHECKS.

1. *Banker — Crossed Check.*] The crossing of a check payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check that the banker upon whom the check is drawn ought not to pay it except through a banker; for if he does so, and the person actually presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount. *Bellamy v. Majoribanks*, 513.

The banker's duty is the same where the crossing is by the customer or by an intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. *Ib.*

2. *Negligence.*] In an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a check on the defendants, crossed thus, "Bank of England, for account of the Accountant-General." The payee to whom this check was delivered struck out the crossing by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers, and paid it into their bank to the credit of his own account. The check being presented by them for payment was paid by the defendants, who charged it to the debit of the plaintiffs' account. The payee appropriated the sum so received to his own purposes, and it never was paid to the Accountant-General; and the plaintiffs, who were trustees, were obliged to pay the amount themselves:—

Held, that the circumstance of this check being thus doubly crossed afforded no additional evidence of negligence against the defendants. *Ib.*

BANK-NOTES.

Levy — 1 & 2 Vict. c. 110, s. 12.] Bank-notes and money seized under a *fi. fa.* are subject to the same rights and liabilities as goods are when so seized, and cannot be appropriated by the sheriff under stat. 1 & 2 Vict. c. 110, s. 12, to satisfy a *fi. fa.* against the execution creditor. *Collingridge v. Paxton*, 402.

BANKRUPT.

1. *Consolidation Act, 1849 — 12 & 13 Vict. c. 106, s. 224.*] A composition deed,
VOL. VIII. 53

Common Law.

executed by six sevenths in number and value of the creditors of a trader, whose debts amount to 10*l.* and upwards, whereby, in consideration of a composition to be paid upon the full amount of their debts, they agreed to release the trader, is binding upon the rest of the creditors, (not parties to it,) as a deed of arrangement, under the 12 & 13 Vict. c. 106, s. 224. *Telley v. Taylor*, 370.

2. *Arrangement by Deed — Composition Deed — Distribution of Estate.*] A deed of arrangement may be within the clauses of that act respecting arrangement by deed, although it does not provide for the distribution of the whole estate of the trader. *Ib.*
3. *Drew v. Collins*, 20 Law J. Rep. (N. S.) Exch. 396; s. c. 4 Eng. Rep. 540, dis-sented from. *Ib.*

BASTARD.

1. *Form of Bastardy Order when no Evidence is tendered by Defendant — 8 & 9 Vict. c. 10, Sched. No. 8.*] A case from the Quarter Sessions set out a bastardy order, under sect. 1 of stat. 8 & 9 Vict. c. 10, which omitted the following words in form 8 of the schedule — “and having also heard all the evidence tendered by the defendant;” and found that no evidence was in fact tendered by the defendant. The case also set out the evidence which was given to corroborate that of the mother:—*Held*, First, that the order was good, without alleging that no evidence was tendered by the defendant. *Regina v. Percy*, 365.
2. *Corroborating Evidence — 7 & 8 Vict. c. 101, s. 3.*] Secondly, that whether the evidence corroborated that of the mother, was a question for the justices, under sect. 3 of stat. 7 & 8 Vict. c. 101; and therefore, unless it was incapable of doing so, this court would not quash the order. *Ib.*

BILL OF EXCEPTIONS.

See EXCEPTIONS. NONSUIT.

BILL OF PARTICULARS.

See PLEADING.

BILLS OF EXCHANGE.

See BANK CHECKS. USURY.

BURGESS LIST.

See ELECTION.

BURIAL.

Neglect to Bury, when no Nuisance.]

See NUISANCE.

CARRIERS.

1. By 5 & 6 Will. 4, c. 107, the defendants were incorporated for the purpose of making and working the Great Western Railway.
- By s. 163, all persons were empowered to use the railway, with proper carriages, upon payment of such rates and tolls as the act authorized to be taken.

Common Law.

By s. 164, tolls, none of which exceeded 8d. per ton per mile, were allowed to be taken by the company for tonnage of articles to be conveyed on the railway.

By s. 166, the company were empowered to provide power for drawing articles on the railway, and to receive such sums for the use of such power as they should think proper, in addition to the other rates, tolls, or sums by the act authorized.

By s. 167, the company were authorized to use locomotive or other power, and in carriages drawn thereby to convey goods, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls by the act authorized.

By s. 171, the company were empowered to make such orders for fixing a sum to be charged in respect of small parcels not exceeding five cwt. as to them should seem proper; "provided that the said provision shall not extend to articles sent in large aggregate quantities, though made up of separate parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent at the same time.

By s. 175, it was provided, that the rates and tolls to be taken by virtue of that act should be charged equally and after the same rate per ton per mile in respect of the same description of articles, and that no reduction or advance in the same should either directly or indirectly be made, partially, or in favor of or against any particular person; but that every such reduction or advance should extend to all persons using the railway or carrying the same description of articles thereon.

By 1 & 2 Vict. c. 92, s. 44, the company were empowered to receive a reasonable charge for the loading and unloading or weighing any articles which they might be required to load, unload, or weigh.

By 7 & 8 Vict. c. 3, s. 50, the company were empowered, whenever they should act as carriers or provide locomotive power or carriages for the conveyance of goods, to charge for such power and carriages such sum (not exceeding the sums, if any, limited by former acts,) as they should think expedient. Provided, that such charges should be made equally to all persons in respect of all articles of a like description and conveyed in a like carriage over the same portion of the railway and under the like circumstances, and no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favor of or against any particular person.

The plaintiff, a carrier, sought to recover, in an action for money had received, the amount of sums alleged to have been overcharged by the defendants for carriage of goods by their railway.

In addition to the rates fixed by the company for the carriage of goods by their scale-bills, they charged the plaintiff a sum for "loading, unloading, covering, and risk of stowage." The plaintiff never required the company to load or unload:—

Held, that the rate fixed for "conveyance," where the company acted as carriers under s. 167 of 5 & 6 Will. 4, c. 107, included the above charges; and that s. 44 of 1 & 2 Vict. c. 92, did not apply to the case where the company acted as carriers in conveying the goods of other persons, but only to cases in which they did not act as carriers, but performed the duty of loading and unloading for other persons carrying goods, being requested by them to perform it. *Parker v. The Great Western Railway Company*, 427.

2. Up to a certain time the company had made an allowance of 10l. per cent. to the plaintiff and other carriers for requiring them to sign certain ticking-off notes and declarations whenever they delivered goods to be carried by the company. In order to make these, some trouble was required in weighing and classifying the goods. The allowance was discontinued after the decision in *Parker v. The Great Western Railway Company*. The same notes were not required from persons not being carriers:—

Held, that the requiring such additional matter from carriers without allowance, did not entitle them to an action for money had and received, as for an overcharge to them, as compared with the rest of the public, in violation of the 5 & 6 Will. 4, c. 107, s. 175; but that it was the subject of an action for damages for any injury sustained in consequence. *Id.*

Common Law.

3. The plaintiff and other carriers were in the habit of making charges for booking parcels. The company entered into an agreement with E. S. to convey goods to and from their station for 1000*l.*, and to relinquish booking-fees, which he did:—
Held, that, assuming the practice of booking without fees to be continued by E. S., this was no violation of the proviso in s. 175, the plaintiff not being bound to charge any thing for booking, but doing it merely for his own benefit. *Ib.*

4. The company charged the plaintiff and other carriers 50 per cent. more for "packed parcels" than they charged the public in general:—

Held, that this was a violation of the proviso in the 5 & 6 Will. 4, c. 107, s. 175, and in the 7 & 8 Vict. c. 3, s. 50, and that the plaintiff was entitled to recover back the sums so paid. *Ib.*

5. The company, by a scale-bill, in force up to June, announced that on miscellaneous goods, not being aggregate of one "kind or class," they would charge 2*d.* extra:—

Held, that, by having used the words "kind" and "class" as synonymous, they were bound by their own definition, and could not charge goods of the same class in their scale-bill as goods unconnected with goods of a like nature, within the meaning of the proviso in s. 141 of the 5 & 6 Will. 4, c. 107. *Ib.*

By a subsequent scale-bill the goods were divided into "classes" without any miscellaneous class, and it was announced that a parcel-rate would be charged on all parcels under one cwt. When several parcels in one lot of goods of the same class but of different kinds, each separately being under one cwt., but in the aggregate above one cwt., were directed to one consignee (as was generally the case where the company carried them for the public,) the company charged tonnage-rate on such lot of parcels; but when a similar lot of parcels was delivered by carriers, directed to different consignees, the company charged each separate parcel at the parcel-rate:—

Held, an unequal mode of charging within s. 50 of the 7 & 8 Vict. c. 3, and that the fact of being directed to the same or different consignees does not prevent goods from being goods carried "under the same circumstances" within that section. *Ib.*

The mere division of goods into "classes" in the scale-bill would not enable the plaintiff to treat all the goods in a particular class as goods "of a like nature," within s. 471 of the 5 & 6 Will. 4, c. 107, or as goods of a "like description" within s. 50 of the 7 & 8 Vict. c. 3, (post, 8th head.)

6. *Held*, that where several parcels of goods of the same kind were sent together and amounted to a greater weight than five cwt., (or the weight fixed upon by the company as the dividing point between the tonnage and parcels rates,) they could not be charged an additional sum as "miscellaneous goods," or at the parcel-rate within s. 181 of the 5 & 6 Will. 4, c. 107. *Ib.*

7. *Held*, that in addition to the toll of 8*l.* per cent. which the company were empowered to take by s. 164 of the 5 & 6 Will. 4, c. 107, for tonnage, they were also entitled by s. 167 to charge a reasonable sum for "conveyance" of goods as carriers, including loading, unloading, risk, &c., and were not restricted to "such sum as they should think expedient for locomotive power and carriages," within s. 50 of the 7 & 8 Vict. c. 3, (assuming that to be the true construction of the last-mentioned section.)

8. *Held*, that according to the proper construction of the 5 & 6 Will. 4, c. 107, s. 171, where several small parcels of a like nature, being altogether less than one cwt., (the scale-bill fixing that as the limit,) were delivered in one lot directed to different consignees, the company were entitled to charge as one "small parcel" within that section at the parcel-rate; and where such several small parcels were not of a like nature, though in the same "class" in the scale-bill, the company were entitled to charge each of them as a separate parcel at the parcel-rate. *Ib.*

8. The Great Western Railway Company, before the 7 & 8 Vict. c. 3, came into operation, was obliged by the 2 & 3 Vict. c. 27, s. 24, to charge for carriage to all persons equally, but they charged P., a carrier, differently from, and more than the public:—

Held, in accordance with *Parker v. The Great Western Railway Company*, that the overcharge was recoverable as money received to the carrier's use. *Edwards v. The Great Western Railway Company*, 447.

Common Law.

10. The 7 & 8 Vict. c. 8, by sections 48, 49, and 50, repealed the 2 & 3 Vict. c. 27, s. 24, and reenacted it, with the difference that in section 50, the words "under like circumstances" were introduced. The company continued to charge P. more than the public:—

Held, that he might recover the overcharge, the fact of his being a carrier only, not rendering the circumstances unlike. *Ib.*

11. Unlike the company's original act, 5 & 6 Will. 4, c. 107, s. 171, the company was authorized to fix the sums to be charged for small parcels, provided they were not sent in large aggregate quantities, made up of separate and distinct parcels. The company published scale-bills, in which they specified divers classes, containing different kinds of goods, and one class comprised miscellaneous goods, "not being aggregate of one class or kind," which were charged at a higher tonnage-rate, with an extra charge for each parcel. The company charged P. under the miscellaneous class for aggregate goods, which, though of different kinds, were within the same class in the scale-bills:—

Held, that this was an overcharge, and that the word "class" must be taken to mean something more than "kind," and to apply to the classes mentioned in the scale-bills. *Ib.*

12. *Held*, also, with regard to all the foregoing overcharges, that it made no difference that the separate parcels, which were all to be delivered to the carrier or his agents at the end of the journey, were destined for different ultimate consignees. *Ib.*

13. P.'s servants assisted the company's servants in loading, unloading, and weighing, but not at the company's request, and the public gave no such assistance. The company before the decision of *Parker v. The Great Western Railway Company*, had allowed 10 per cent. for such assistance, and P. in this case claimed a similar deduction:—

Held, that P. was not entitled to any deduction on this ground. *Ib.*

14. The company, before the decision in *Parker v. The Great Western Railway Company*, had entered into an agreement with K. to allow him 10 per cent. discount, but after that decision they refused to make the allowance. K. brought an action and recovered a verdict for the 10 per cent., which the company paid accordingly. P. claimed the 10 per cent. on the ground that he and K. had been charged unequally, K. having been allowed that amount:—

Held, that this was not an allowance which made the charge unequal. *Ib.*

15. P. paid the overcharges under protest, and after notice of action to the company he sent in a claim in writing of interest. It was objected, that as the notice of action did not contain a claim for interest it could not be recovered; but as there was no plea of want of notice of action, and as the action and all matters in difference had been referred to an arbitrator:—

Held, that the arbitrator might award interest under the 3 & 4 Will. 4, c. 42, s. 4. *Ib.*

CASES OVERRULED, DOUBTED, &c.

<i>Bush v. Steinman</i> , 1 Bos. & Pul. 404, doubted,	479
<i>Drew v. Collins</i> , 4 Eng. Rep. 540, dissented from,	370
<i>Edgar v. Halliday</i> , 1 Lownd. M. & P. 367, overruled,	355
<i>Matthews v. The West London Waterworks Company</i> , 3 Camp. 403, doubted,	479
<i>Strother v. Hutchinson</i> , 4 Bing. N. C. 88, explained,	382
<i>Regina v. Bannatyme</i> , 2 Lownd. M. & P. 218; 4 Eng. Rep. 188, doubted,	368

CHARTER.

See CORPORATION.

CLASS.

Meaning of, in 5 & 6 Will. 4, c. 107.]

See CARRIERS.

Common Law.

CLERGY.

Right to Tithes.]

See TITHES.

COAL-MINES.

Lease of— Construction.] A lease of alum-mines gave the lessee the right to obtain alum from certain coal-wastes. A subsequent lease of the coal-mines provided that nothing thereby granted shall injure the rights of the parties who held the alum-mines. The alum existed in the coal-wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be impossible to be reached:—

Held, that the coal-pillars could not be removed. *Earl of Glasgow v. Hurlet and Campsie Alum Co.* 13.

COMMON CARRIERS.

See CARRIERS.

COMPOSITION DEED.

See BANKRUPT.

CONDITION.

See CONTRACT.

CONSIDERATION.

See PLEADING.

CONSTABLES.

Right of Arrest.]

See FALSE IMPRISONMENT.

CONTRACT.

1. *Condition—Discretion of Engineer.]* The defendants, a railway company, by a deed containing several stipulations, covenanted to pay the plaintiffs, contractors, "for and in respect of the said sleepers hereinbefore contracted to be supplied, at the rate of 4s. 3d. per sleeper." The preceding part of the deed, after reciting that the defendants were desirous of being supplied with 350,000 sleepers, and that the plaintiffs were willing to supply the said 350,000 sleepers mentioned in the specification annexed, contained a covenant by the plaintiffs within the time and at the place mentioned in the specification, as and where, and in such quantities, and in such manner as one of the engineers of the company should from time to time or at any time within the period limited by the specification require or direct, to supply the said company with 350,000 sleepers of the description mentioned in the specification. The deed also contained certain provisions giving the engineers of the company a discretion to alter the shape of the sleepers at any time before the complete execution of the contract by delivery of the whole 350,000, and to give notice when and in what number the sleepers were to be delivered, and to reject defective sleepers. The specification referred to in the deed, mentioned that the number required

Common Law.

was 350,000, one half to be supplied in 1847, the other before midsummer 1848, and that the port of delivery was Goole. The company were empowered to retain in their hands the sum of 2000*l.* out of the payments which were to be certified as due by the engineers, as a guaranty for the completion of the contract, until the whole 350,000 should have been supplied:—

Held, that this was a positive contract to take and pay for 350,000 sleepers, notwithstanding the discretion vested in the engineers to decide when and in what quantities the sleepers were to be delivered. *Harrison v. The Great Northern Railway Co.* 469.

2. *Pleading.*] *Held*, also, that before they were bound to deliver any of the sleepers, the plaintiffs were entitled to notice when and in what quantities they were to be delivered; and that a declaration, which stated that the plaintiffs were always ready and willing to deliver the sleepers, according to the specification, when and in such quantities as any of the engineers of the company should require, but that the company's engineers gave no requisition within the times during which the sleepers were to be delivered, was good upon general demurrer. *Ib.*

CONTRACTOR.

Not liable for Negligence of Sub-Contractor.

See ACTION.

CONVERSION.

See TROVER.

CORPORATION.

1. *College — Statutes, Construction of — Right of Voting for Corporate Officer — Charter — Delegation of Powers by Crown — Usage.*] King James I. by a charter in 1619, granted to E. A. license to found a college, which should consist of one master, one warden, four fellows, six poor brethren, six poor sisters, and twelve poor scholars, to be maintained, &c. according to such ordinances, &c. as should be made by the said E. A., with power to the said E. A. to make ordinances, &c. for the maintenance, rule, government, &c. of the said master, warden, &c., which shall be a body corporate. E. A. by deeds in 1619 created the college, to consist of the several persons named in the charter, and by an indenture dated in 1620, he endowed the college with lands in three parishes. By an instrument made in 1826, E. A., by virtue of the power given to him by the charter, made certain ordinances, &c. for the government of the said college. These ordinances provided that the church-wardens of the three parishes where the college lands were situate should be assistants to the master, warden, and fellows of the said college in the governing thereof, and gave them power to elect the poor brethren, sisters, and scholars from the parishes to which they respectively belonged. They also provided that if the place of warden should be void, "the master, assistants, and fellows" should go into chapel and "proceed to the election of a new warden," and that, after the senior fellow had read the statutes relating to the persons to be elected, "the electors should make the said election indifferently," &c. If both the places of master and warden should be void at one time, notice was to be given by the senior fellow to the assistants to repair to the college within three days "to join with the fellows in the election of a new master, which should be in all points as he formerly described in the election of a warden." The assistants had always, from the foundation of the college, been accustomed to vote at the elections of wardens:—

Held, first, that by these ordinances, coupled with the invariable usage, the assistants had a voice in the election of warden; and secondly, that E. A., although he could not alter the constitution of the college, had power to give the assistants, who were not members of the corporation, a right of voting for a corporate officer; and thirdly, that the lapse of time after the foundation of the college did not take away his right to make such an ordinance. *Regina v. The Master, Fellows, &c. of God's Gift in Dulwich*, 385.

Common Law.

2. *Mining Company—Power of Directors to Borrow Money.*] The directors of a mining company have no implied authority to borrow money on the credit of the company, for the purpose of carrying on the mines, or for any other purpose, however useful or necessary to the objects for which the company is formed. *Burmaster v. Norris*, 487.
3. By the deed of settlement under which a company was carried on, a capital of 50,000*l.* was provided, and there were powers to create new shares, and to alter the provisions of the deed by the vote of a special general meeting. There was also a clause "that the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall be not less than five nor more than nine, and three of them shall, at all meetings of directors, and for all purposes, be competent to act":—
Held, that under this deed the directors had no express authority to borrow money for the necessary purposes of the mines. *Ib.*

COSTS.

- Application for Costs after Summons dismissed at Chambers—Sect. 13 of Stat. 13 & 14 Vict. c. 61—Lapse of two Terms.*] On the 26th May, 1851, a judge at chambers made an order dismissing a summons by the plaintiff for costs, under sect. 13 of 13 and 14 Vict. c. 61, the Court of Exchequer having decided that the section was permissive, not imperative. In Michaelmas vacation the Court of Common Pleas decided differently:—
Held, that an application by the plaintiff to this court for costs in Hilary Term, 1852, was too late. *Orchard v. Mozzy*, 349.

COUNTY COURT.

1. *Concurrent Jurisdiction, &c.—Discretion of Judge—Order for Costs—9 & 10 Vict. c. 95, s. 12—13 & 14 Vict. c. 61, s. 13.*] In all cases where the superior courts have a concurrent jurisdiction within the county courts, under the 128th section of 9 & 10 Vict. c. 95, or where no plaint could have been entered in any county court, or where the cause is removed from the county court by *certiorari*, the court or a judge is bound, by the 13 & 14 Vict. c. 61, s. 13, on being satisfied that the case falls within the 128th section, to make an order that the plaintiff who has recovered less than 20*l.* in a superior court shall recover his costs. *Asplin v. Blackman*, 524.
2. *Claim above 50*l.*—Abandonment of Excess; when to be made.*] Where a plaint is brought in a county court to recover 50*l.* in respect of a cause of action to a greater amount, the excess being abandoned, pursuant to 9 & 10 Vict. c. 95, s. 63, the abandonment need not appear upon the plaint or particulars of demand, although such is the most reasonable course. *Isaacs v. Wyld*, 491.
3. Where, therefore, at the hearing the excess was abandoned, and a minute made by the judge of the abandonment, it was:—
Held, on motion for a prohibition, that he had jurisdiction to give judgment and grant execution for 50*l.* *Ib.*

CROSSED CHECKS.

See BANK CHECKS.

CUSTOM OF COUNTRY.

See LANDLORD AND TENANT.

DEED.

Deed of Transfer of Shares void, Call being unpaid—8 & 9 Vict. c. 16, s. 19.] On

Common Law.

the 13th March, a shareholder in a joint-stock company, subject to the Companies Clauses Consolidation Act, 1845, executed a deed of transfer of his shares, and his broker lodged the deed of transfer with the secretary of the company for registration. The secretary refused to register it, on the ground that a call made upon the shares before the 13th March remained unpaid until the 14th April. Upon application for a mandamus to the secretary to enter and register a memorial of the deed of transfer:—

Held, that by sect. 16 of stat. 8 & 9 Vict. c. 16, the right to transfer shares was taken away until all calls made in respect thereof had been paid; and the deed of transfer was, therefore, void. *James Hall v. The Norfolk Estuary Co.* 351.

DELEGATION OF POWER.

See CORPORATION.

DELIVERY.

Of a Promissory Note.]

See PROMISSORY NOTE.

DEPOSITIONS.

See EVIDENCE.

DESCRIPTION.

Of Real Estate, at Sale.]

See VENDOR.

DIRECTORS.

In a Company, their power to borrow Money.]

See CORPORATION.

DISCLAIMER.

See LANDLORD AND TENANT.

DISCRETION.

See CONTRACT.

DISTRESS.

1. *When Wrongful—Opening outer Door.]* A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. *Ryan v. Shilcock*, 503.

2. Therefore, where the door of a stable was kept closed by a padlock attached to a movable staple, and the owner or other persons usually opened the door by pulling out the staple:—

Held, that a distress upon such goods in the stable, after an entry in this mode, was legal. *Ib.*

3. *Quære*, whether a distress is void where the outer door is improperly broken. *Ib.*

DISCHARGE.

Insolvency, Effect of.]

See JUDGMENT.

Common Law.

DISTRIBUTION.

See BANKRUPT.

EJECTMENT.

Mortgage — Tenancy at Will.] A mortgage contained a power of sale and then a proviso and covenant, by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent in lieu of and as interest upon the mortgage money. The mortgage remained in possession of the premises, but no livery of seizin was made to the mortgagor. Prior to the commencement of the action, there was a demand of possession, but no notice to quit was ever given to the mortgagor:—

Held, that the effect of the deed was to create a tenancy at will only; and that a demand of possession, without any notice to quit, was sufficient to entitle the mortgagee or his assignee to maintain ejectment. *Doe d. Dixie v. Davies*, 510.

ELECTION.

1. *Burgess List*—5 & 6 Will. 4, c. 76, s. 17.] D.'s name being accidentally omitted from the burgess list of the borough of H., he sent in a notice under the 5 & 6 Will. 4, c. 76, s. 17, claiming to have his name inserted. He had signed this notice, "A. W. Dobing," and did not attend the revision of the list to substantiate his claim. The mayor and assessors refused to insert his name in the list, upon the ground that they could not place it there with initials only for the Christian name, nor, under the circumstances, with the Christian name in full, although it was proved to them that he was entitled to have his name inserted, and that there was no other person of a similar name in the borough; and it also appeared that "A. W." meant "Anthony Wilson":—

Held, that the mayor and assessors would have been justified in placing his name upon the list, and the court would now order it to be done. *Regina v. Mayor and Assessors of Hartlepool*, 308.

2. *Election of Councillor*—5 & 6 Will. 4, c. 67, s. 32—*Meaning of "Place of Abode" of Candidate in Voting Paper.*] At the time of an election of town councillors for the borough of Y., W. H., a candidate, resided with his family in High Street, and carried on the business of a miller in Church-road, having a mill there. His place of residence and place of business were both in the parish of G., and within the limits of the borough. A certain number of the voting papers, necessary for his due election, described him as "W. H., of Church-road, G., Miller." He was as well known by his place of business as by his place of residence. In *quo warranto* against W. H., upon an issue whether the voting papers in question contained the place of abode of defendant:—

Held, that sect. 32, of stat. 5 & 6 Will. 4, c. 76, which required the voting papers to state the "place of abode" of the candidate, meant "the place of residence." *Regina v. Hammond*, 356.

See CORPORATION.

EMBEZZLEMENT.

Venue.] The duty of a servant was to go into a neighboring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night.

Common Law.

The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Two months afterwards his master met him in N., and asked him for the money, upon which he stated that he was sorry he had spent it :—

Held, that there was evidence for the jury of an embezzlement in N. *Regina v. Murdock*, 577.

ERROR.

See NONSUIT.

EVIDENCE.

1. *Previous Conviction in reply to Evidence of Character.*] Upon the trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by the prisoner's counsel, stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. Thereupon the prosecution proved that the prisoner had been convicted of larceny ten years before :—

Held, that the previous conviction was admissible under 6 & 7 Will. 4, c. 111, and 14 & 15 Vict. c. 19. *Regina v. Shrimpton*, 581.

2. *Notice of Appeal—Application for Copy of Depositions*—11 & 12 Vict. c. 31, s. 9.] Upon an appeal against an order of justices, it became necessary to prove an application for a copy of depositions, under the 11 & 12 Vict. c. 31, s. 9. The only application which had been made was by a letter, which was not produced, and no steps had been taken in order to let in secondary evidence of its contents. The copies of the depositions were themselves produced, and shown to have been sent in a letter by the magistrates' clerk :—

Held, that the Quarter Sessions were right in refusing to act upon parol evidence of that application. *Regina v. The Justices of the West Riding of Yorkshire*, 295.

Of Fraud.]

See FRAUD.

Materiality of.]

See PERJURY.

EXCEPTIONS.

Alteration of.] A bill of exceptions was tendered to a judge's direction, and under the 55 Geo. 3, c. 42, s. 7, was signed by him at the time of the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the court :—

Held, that the introduction of this explanation was highly irregular : but that, being on the record, the court below, and the House of Lords, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. *Earl of Glasgow v. Hurler and Campsie Alum Company*, 18.

See NONSUIT.

EXCURSION TICKETS.

See RAILWAY COMPANY.

Common Law.

EXECUTOR.

See WILL.

EXECUTION.

Levy on Bank-Notes.]

See BANK-NOTES.

FALSE IMPRISONMENT.

Arrest by a Police Constable — Charge of Furious Driving — Conviction.] The plaintiff sued the defendants, who were police constables, in a county court, for a tort, charging them with having arrested and imprisoned him on a false and unfounded charge of furious driving. On the trial, the plaintiff stated that the defendants had taken him into custody and detained him in a police station on the charge of furious driving; that the charge was false and unfounded, but that he had been convicted of it by two justices and paid the penalty. The defendants thereupon objected that the plaintiff was put out of court by his own statement, and then proved the conviction. The statute 2 & 3 Vict. c. 47, s. 54, authorises police constables to take into custody persons committing the offence of furiously driving in a public highway in their view. The case did not show that the plaintiff committed the offence of furious driving in the view of the defendants. The county court judge directed the jury that the conviction was a conclusive answer to the plaintiff's claim: — The Court of Appeal held, that the direction of the judge below was wrong, and reversed the judgment. *Justice v. Gosling*, 476.

FERRE NATURÆ.

What are.]

See LARCENY.

FIERI FACIAS.

See BANK-NOTES.

FIXTURES.

Trover for.]

See TROVER.

FOREIGN JUDGMENT.

• See JUDGMENT.

FORMER CONVICTION.

Practice — Mode of Proceeding upon Indictment charging previous Conviction — 14 & 15 Vict. c. 19, s. 9.] When an indictment charges a previous conviction, the proper method is to arraign the prisoner upon the whole indictment, and, if he plead not guilty, then to swear the jury, and to charge them in the first instance to inquire only as to the subsequent offence, reading to them only that part of the indictment, unless evidence of character should be given on the part of the prisoner; but after he has been convicted of that subsequent offence, then, without reswearing them, to read the other part of the indictment to the jury, and charge them to inquire as to the previous conviction. *Regina v. Key*, 584.

Common Law.

FORMER CONVICTION.

When admissible Evidence.]

See EVIDENCE.

FRAUD.

Evidence of.] Where work was proved to have been done for the defendant by the plaintiffs jointly, the defendant produced in evidence a release to him from one of the plaintiffs, a marksman, who was proved to have executed it in the presence of the clerk of the defendant's attorney on the morning of the day of trial, without the knowledge of the other plaintiffs. The purport of the deed was, however, proved to have been explained to the releasing plaintiff, who was said to have told the witness that he was no party to the present action :—

Held, that the above amounted to some evidence of the release having been given fraudulently, and the judge of the county court was, therefore, not bound to give effect to it. *Wedlake v. Sargent*, 404.

FRIENDLY SOCIETY.

10 Geo. 4, c. 56, s. 9—*General Meeting—Public Notice—Signature of Officer.]* The members of a friendly society having duly agreed to and signed a requisition for convening a general meeting, to take into consideration the propriety of rescinding or altering the rules of the society :—

Held, (ERLE, J., *dissentiente*,) that the signature of "the secretary or president or other principal officer or clerk of such society," required by 10 Geo. 4, c. 56, s. 9, was merely a formal act, and that one of such officers was bound to sign the public notice necessary to convene the meeting, in compliance with the requisition. *Regina v. Aldham and United Parishes Ins. Society*, 369.

FURIOUS DRIVING.

See FALSE IMPRISONMENT.

GAMING.

See PLEADING.

GENERALITY.

See PLEADING.

HIGHWAY.

See INDICTMENT.

INDICTMENT.

For Non-repair of Highway—Misdescription of Part out of Repair—Defective averments in second Count cured by Reference to first.] The first count of an indictment for the non-repair of a highway alleged, "that a certain part of the highway, situate in the township of W., leading from and out of the highway from the village of W. towards M., at or near a place called Parkside, on the said last-mentioned highway," (describing it, and stating its length and breadth,) "was ruinous, and in decay," and that defendants of right ought to repair it. The second count alleged, that the inhabitants of the township of W. had immemorially repaired the highways

Common Law.

situate within it, and "that the said part of the same common highway hereinbefore mentioned to be ruinous, &c. as aforesaid was a common highway" which, but for the said prescription, would be reparable by the parish at large; and that, by reason of the premises, defendants "ought to repair the same part of the said highway, so being ruinous, &c. as aforesaid, when and so often as it hath and shall be necessary, and that defendants had not repaired the same." It appeared that there was no place called Parkside on the road in question, but that the place intended was called Parkgate. Defendants were acquitted on the first count, and found guilty on the second:—

Held, First, that the misdescription of the part of the road alleged to be out of repair was immaterial. *Regina v. Waverton*, 344.

Secondly, on motion to arrest the judgment, that though the second count did not in itself sufficiently charge that the part of the road was out of repair, it did so by its clear and distinct reference to the first count. *Ib.*

Also, that the part of the road out of repair having been alleged in the first count to be in the township of W., the second count was sufficient by reference to the first, without a repetition of the allegation. *Ib.*

INITIALS.

Instead of Christian name.]

See ELECTION.

INSOLVENCY.

1 & 2 Vict. c. 110—*Petition—Contents—Pleading—Generality—Jurisdiction.*] A replication to a plea of set-off alleged that the defendant being in custody within the walls of the Queen's Prison at the suit of B, applied according to the provisions of the 1 & 2 Vict. c. 110, to the Insolvent Court, stating in his petition that he was willing his personal estate should be vested in the official assignee; and that an order was made accordingly:—

Held, that the replication was good. That it is sufficient in such a pleading to say, that the proceedings were according to the act, without showing that the petition stated all the requisites of the 35th section. That the court will take judicial notice that the Queen's Prison is in England. And that it was not necessary to allege in the replication on what process the defendant was in custody. *Wickens v. Goadley*, 420.

Quere, whether it is necessary that a petition to the Insolvent Court should aver all the particulars mentioned in the 35th section of the act in order to give the court jurisdiction. *Ib.*

See JUDGMENT.

INTEREST.

See RAILWAY COMPANY. CARRIERS.

JUDGMENT.

Colonial Judgment, Action on—Colonial Insolvency—Suspension of Execution—Discharge.] To an action on a judgment at the Cape of Good Hope, the defendant pleaded that by an ordinance in that country relating to insolvents, it was enacted that the court might on the petition of an insolvent place his estate under sequestration, and that further execution of any judgment against him or his estate for any debt, should, after lodging the order for sequestration, be stayed during the pendency of such sequestration, and that all actions pending against any insolvent for any debt provable against his estate should upon any order being made for sequestration, be stayed. The declaration then stated the petition of the defendant, the surrender of his estate, its being placed under sequestration, and that the estate was

Common Law.

distributed, and upon such distribution the plaintiffs received a dividend of 1s. 6d. in the pound on the amount of the judgment debt in the declaration : —

Held, on demurrer, that the plea was bad, as it merely showed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent. *Frith v. Wollaston*, 559.

In Absence of Defendant.]

See NUISANCE.

JURISDICTION.

See INSOLVENCY. COUNTY COURT.

Of Quarter Sessions.]

See POOR.

LANDLORD AND TENANT.

1. *Out-going Tenant — Custom of Country — Special Agreement.*] A testator, being the owner of B. house and land and of two cottages, and the lessee of Little B. farm from Miss M., and of certain crown lands, for a term of fourteen years expiring at Michaelmas, 1849, and being desirous of selling B. house and land, entered into a negotiation with the plaintiff for the sale thereof, and let to the plaintiff for one year B. house and land, from the 29th of September, 1848, by an agreement, in which the testator agreed that if he should be able to obtain a further lease from the crown for fourteen years he would grant the plaintiff the same for thirteen years. By a subsequent agreement, the plaintiff, after stating that he was desirous of securing the occupation of Little B. farm and lands, adjoining the B. house and lands, and held by the testator of Miss M. and of the crown, agreed to take the said lands belonging to Miss M. and the crown, as under-tenant to the testator, "subject to the same rents, covenants, and obligations in all respects as provided for in the leases by which Mr. C. (the testator) holds or shall hold the same." By the terms of the crown lease the custom of the country, which was, that the landlord should pay to the out-going tenant for fallows, half fallows, &c., was excluded. The plaintiff, on entering upon the crown lands, paid the testator for fallows, half fallows, &c. The crown lease, at the request of the plaintiff, not having been renewed by the testator, but having expired by effluxion of time at Michaelmas, 1849 : —

Held, that the plaintiff, as out-going tenant, was entitled to be paid by the executors for fallows, half fallows, &c., the custom of the country to that effect not having been excluded by the agreements between the parties. *Faviel v. Gaskoin*, 526.

2. *Parol License to enter Premises after Expiration of Tenancy.*] The declaration stated that the plaintiff had been tenant to one B., and during his tenancy had put up certain fixtures; that before the expiration of the tenancy B. granted to the plaintiff leave and license to keep the said fixtures on the premises after the expiration of the tenancy, in order that he might sell them to the incoming tenant, and to enter and recover them if such tenant would not purchase them; that the defendant subsequently became tenant; that he would neither purchase the fixtures nor allow the plaintiff to enter and remove them. The plaintiff traversed that B. granted such license to the plaintiff. At the trial, the plaintiff gave in evidence the following letter written to him by B.'s attorney: "Mr. B. has no objection to your leaving the fixtures on the premises and making the best terms with the incoming tenant : —

Held, that this document, if it gave a license at all, gave one coupled with an interest in land; and that therefore, not being under seal, it could not be enforced against the incoming tenant. *Ruffey v. Henderson*, 805.

3. *Notice to Quit after Disclaimer.*] In 1824, J. B., a pauper of the parish of P., was put into a parish house, under the following memorandum in the parish book, signed by one of the overseers: "We, the church-wardens and overseers of the poor of the parish of P., do hereby agree to let to J. B., of the parish of P., the cottage situate, &c., at the rent of 1s. 6d. per week; and the said J. B. doth hereby agree to quit and give up the said cottage to the parish officers at any time on one month's notice."

Common Law.

J. B. continued in possession, without payment of rent, until 1844, when the parish officers gave him a notice to quit, signed by three only of them, which he refused to do. In 1850, J. B. conveyed the cottage to defendant. In ejectment by the parish officers:—

Held, first, that there having been a disclaimer by J. B., no notice to quit was necessary. *Doe d. Lansdell v. Gower*, 317.

4. *Lease by Parish Officers*—*Stat. 59 Geo. 3, c. 12, s. 17.*] Secondly, that the memorandum, not being signed by all the parish officers or by their order, was not a lease, in pursuance of sect. 17 of stat. 59 Geo. 3, c. 12. *Ib.*

5. *Stat. 3 & 4 Will. 4, c. 27, ss. 5, 8.*] Thirdly, that the action, not being within sect. 5 of stat. 3 and 4 Will. 4, c. 27, was barred by sect. 8. *Ib.*

6. *Lease—Merger—Assignment operating as New Lease.*] A, the plaintiff, devised to B certain premises for a term of fifty-five years, in consideration of 530*l.*, subject to the payment of a yearly rent of 84*l.*, and covenants for repair, &c., but the consideration-money not being paid, B, &c. subsequently assigned to A, by way of mortgage, the whole of the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. Notice of sale having been given by A pursuant to the power, the plaintiff, in consideration of 500*l.* by a deed “bargained, sold, assigned, transferred, and set over” to the defendant the premises described in the lease, to hold for all the rest, residue, and remainder of the said term of fifty-five years granted by the plaintiff to B discharged from the mortgage debt, but subject to the payment of the yearly rent of 84*l.*, and to the covenants in the said lease to B; and the defendant covenanted to pay the rent and perform the covenants. The defendant then entered upon the premises:—

Held, that although the term of fifty-five years was merged by the mortgage to the lessor, the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant was liable upon the covenants to pay the rent, and to perform the repairs. *Cottee v. Richardson*, 498.

See DISTRESS.

LARCENY.

1. *Lost Goods—Taking.*] Upon the trial of an indictment for stealing a bank-note which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for supposing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if at that time, he had not that knowledge or belief, he was not guilty:—

Held, a misdirection; because, if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny. *Regina v. Preston*, 591.

2. *Pigeons.*] Pigeons kept in an ordinary dove-cote, with means of ingress and egress through holes at the top, are the subjects of larceny. *Regina v. Cheafor*, 598.

LEASE.

Construction of.]

See COAL-MINES.

By Parish Officers.]

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LIEN.

See ATTORNEY.

Common Law.

LIBRARY.

Liability to Taxation.]

See POOR RATES.

LICENSE.

See LANDLORD AND TENANT.

LIMITATIONS.

See CORPORATION.

LIMITATIONS, STATUTE OF.

See LANDLORD AND TENANT.

LOST GOODS.

Subject of Larceny.]

See LARCENY.

MANDAMUS.

See ELECTION.

MASTER.

Liability for Servants' Acts.]

See ACTION.

MEETING.

Of Friendly Society.]

See FRIENDLY SOCIETY.

MERGER.

See LANDLORD AND TENANT.

MINING COMPANY.

See CORPORATION.

MISTRIAL.

See TRIAL.

MISTAKE.

Legal Liability, Effect of.]

See PROMISSORY NOTES.

MINES.

See COAL-MINES.

Common Law.

MONEY HAD AND RECEIVED.

See CARRIERS.

MORTGAGE.

See EJECTMENT. LANDLORD AND TENANT. RAILWAY COMPANY. STAMP ACT.
Of Goods.]

See TROVER.

NAME.

See ELECTION.

NEGLIGENCE.

See ACTION. BANK-CHECKS.

NEWS ROOM.

Liability to Taxation.]

See POOR RATES.

NONSUIT.

1. *Judgment as in Case of Nonsuit — Insolvent — Stet Processus.*] After issue joined in an action the plaintiff petitioned the Insolvent Debtors Court, and was discharged as an insolvent debtor, having entered in his schedule the debt which formed the subject of the pending action; but it did not appear whether the assignees were willing to proceed with it or not:—

Held, that the defendant was not entitled to judgment as in case of a nonsuit; but that a *stet processus* might be entered by the joint consent of him and the plaintiff. *Gavin v. Allan*, 575.

2. *Judgment as in Case of Nonsuit — Delay after Removal of Injunction.*] Obtaining an injunction to stay the proceedings does not deprive the defendant of his right to move for judgment as in case of nonsuit. *Dobson v. Brocklebank*, 543.

3. Where subsequent to the removal of the injunction, the plaintiff gave notice of trial, but did not try, the defendant was held to be entitled to move for judgment as in case of nonsuit; and, *semble*, that the time for proceeding to trial, according to the practice of the court, runs from the removal of the injunction. *Ib.*

4. *Bill of Exceptions — Plaintiff's Right to Appear.*] If, upon a trial of a cause, the judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the judge to direct the jury in point of law in his favor, and upon the judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favor, the plaintiff may tender a bill of exceptions, and bring a writ of error. *Cor-sar v. Reed*, 380.

5. *Strother v. Hutchinson*, 4 Bing. N. C. 83, explained. *Ib.*

NOTICE OF TRIAL.

Striking out Similitur — Reg. Gen. H. T. 2 Will. 4, r. 50.] Declaration contained two

Common Law.

counts. The issues on the first count were complete; the second resulted in two surrejoinders, concluding to the country. The plaintiff added similiter, and delivered issue, with notice of trial for the 7th August. On the 6th, the defendants returned the issue and notice of trial, having demurred to one surrejoinder, and delivered a rebutter to the other. On the 7th, the plaintiff redelivered the issue, stating that he should rely on the notice of trial and the issues in fact. The plaintiff then entered a *remittitur* as to the proceedings demurred to, tried the cause, and (the defendants not appearing) obtained a verdict:—
Held, that the issue was incomplete on the 7th; that the notice of trial for that day was, therefore, void, and it could not be rendered valid by any subsequent proceedings.
Poole v. Pain, 314.

NOTICE.

To Produce Documents.]

See PRODUCTION OF DOCUMENTS.

Of Meeting under 10 Geo. 4, c. 56, s. 9.]

See FRIENDLY SOCIETY.

NOTICE TO QUIT.

When not Necessary.]

See EJECTMENT.

NUISANCE.

1. *Neglect of parent to bury his child—Ability—Offer by guardians of money by way of loan.*] Upon an indictment for nuisance, charging the defendant with refusing and neglecting to bury the body of his child, it was proved that the defendant was a pauper, but that the guardians, acting under the laws of the Poor Law Board, had offered him money for the purpose of enabling him to bury his child, upon his signing an undertaking to repay it on demand:—

Held, that he was not bound to accept that offer; and could not be convicted of a nuisance. *Regina v. Vann*, 596.

2. *Indictment for Nuisance—Judgment by Default—Sentence not to be pronounced on Defendant when Absent.*] Defendant had suffered judgment by default on an indictment for a nuisance to a navigable river:—

Held, that the court could not in his absence give judgment that the nuisance be abated. *Regina v. Chichester*, 294.

See ACTION.

ORDERS.

See BANK CHECKS.

ORDER.

In Bastardy.]

See BASTARD.

ORDER OF REMOVAL.

See POOR.

OUTLAWRY.

Reversal by Writ of Error—Special Bail—4 & 5 Will. & M. c. 18, s. 8.] The de-

Common Law.

fendant, an outlaw, in an action for a debt exceeding 20*l.*, appeared by attorney, and brought a writ of error to reverse the outlawry, on the ground that he was abroad at the time of the exigent. Judgment of reversal was signed thereon:—
Held, that the defendant was bound to put in special bail on signing the judgment of reversal; and as he had not done so, the judgment must be set aside as irregular.
Commerell v. Beaucherk, 334.

PARISH.

See POOR.

PARISH OFFICERS.

Lease by.]

See LANDLORD AND TENANT.

PAROL LICENSE.

See LANDLORD AND TENANT.

PARTICULARS.

See PLEADING.

PAYMENT.

Under Mistake of Liability.]

See PROMISSORY NOTE.

PERJURY.

Evidence—Materiality.] Upon the trial of an ejectment, the title of the lessor of the plaintiff depended upon the fact that M. survived J. The will of J. was irrelevant to the title, but proof of the probate was relevant with reference to the time of J.'s death. A copy of the will of J. was tendered in evidence, and, on objection being made, the plaintiff's attorney falsely swore that he had examined the copy with the original, in the registry at Llandaff; and, upon further objection that the probate ought to be produced, or the Act-book proved, he further falsely swore that he had examined the memorandum at the foot of the copy with the entry in the Act-book. The judge then offered to receive the document, but the counsel withdrew it. The memorandum was, in fact, a copy of an entry in a book called "The Act-Book," but not a copy of the act of probate, so that the evidence, if true, would not have rendered the document legally admissible:—

Held, nevertheless, that the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury. *Regina v. Philpotts*, 580.

PIGEONS.

When Subjects of Larceny.]

See LARCENY.

PLEADING.

1. *Several Pleas—Joint-Stock Banking Company—Public Officer.*] In an action by the public officer of a banking copartnership, the court allowed a plea denying that the copartnership were, at the commencement of the suit, carrying on the business of bankers, in addition to pleas of non assumpsit and accord and satisfaction. *Roe v. Fuller*, 558.

Common Law.

2. *Accord and Satisfaction — Assumpsit — Consideration — Plea of no signed Bill, Sufficiency of.*] A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, namely, for so much as the plaintiffs deserved to have of the defendant for work done by the plaintiffs as attorneys for the defendant; that the plaintiffs alleged that the said debts amounted to 171*l.* 9*s.* 8*d.*, and the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue, and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim, and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, "one calendar month before the commencement of this suit, deliver to the defendant a signed bill":—

Held, first, that the plea was good; secondly, that the declaration was bad in not disclosing a sufficient consideration for the defendant's promise to pay the 150*l.* *Bridgman v. Dean*, 534.

2. *Summons and Particulars, Sufficiency of.*] The summons in the county court stated, that the defendant was summoned to answer a claim of the plaintiffs to recover 40*l.* 10*s.*, and the particulars were—"To sinking a shaft at" &c.; "Cr.—Cash on account, £" &c., making the balance the same as the sum claimed:—

Held, that the summons and particulars showed a sufficient ground of action, without stating that the shaft was sunk for the defendant, or further disclosing how he was sought to be made liable for it. *Wedlake v. Sargent*, 404.

3. *Held*, also, that the objection was one which could not be taken after the defendant had pleaded in the county court. *Ib.*

4. *Gaming under 8 & 9 Vict. c. 109, s. 18—Generality—Differences on Sales of Shares.*] To a declaration for differences on the sale of railway shares, the defendant pleaded generally that the contract was by gaming, (under 8 & 9 Vict. c. 109, s. 18.)

On demurrer, the pleas were held bad for vicious generality. *Grisewood v. Blane*, 415.

See CONTRACT. INDICTMENT. INSOLVENCY. NOTICE OF TRIAL.

POLICE OFFICERS.

Right to Arrest.]

See FALSE IMPRISONMENT.

POLICY OF INSURANCE.

See STAMP ACT.

POOR.

Order of Removal—Abandonment—11 & 12 Vict. c. 31, s. 8.] The effect of a notice of abandonment, under the 11 & 12 Vict. c. 31, s. 8, is to take away all jurisdiction from the Quarter Sessions over the appeal, and to operate as a stay of proceedings, subject to the right of the appellants to costs up to the time of the service of the notice. An appeal was entered and respited at the Easter Sessions, 1850. At the following July Sessions, in consequence of a defect in the grounds of appeal, it was adjourned, at the instance of the appellants, to the subsequent October Sessions. Before, however, the last-mentioned sessions were held, a notice of abandonment was given by the respondent parish, but the appellants, notwithstanding this notice, went to the sessions, and the order was quashed, with costs:—

Held, upon motion to remove the order of sessions into the Court of Queen's Bench, under the 12 & 13 Vict. c. 45, s. 18, that the sessions had no jurisdiction to enter upon an appeal after the notice of abandonment had been served. *Regina v. St. Michael's, Pembroke*, 311.

Common Law.

POOR RATE.

Library and News-Room — Liability to Taxation.] “The Portico” in Manchester was erected by a society for the purpose of being used as a library and news-room, and was vested in trustees, upon trust to permit it to be so used by the society. The society consisted of 400 shareholders, who paid an annual subscription of 2*l.* 10*s.*, and were at liberty to transfer their shares. The library contained upwards of 15,000 volumes, for general reference and circulation among the subscribers, comprising works on scientific subjects as well as in general literature, to which additions were continually made. There was a librarian, with an annual salary of 100*l.*, and a reading-room, supplied with periodical works, pamphlets, magazines, and reviews. In the news-room were provided newspapers, the London Gazette, Reports of the Markets, and the Commercial and General Directories:—

Held, that the society was not exempted from liability to be rated within statute 6 & 7 Vict. c. 36, the primary object of the shareholders being their own information and convenience. *Regina v. Gaskell*, 298.

PRACTICE.

See EXCEPTIONS. NOTICE TO PRODUCE. STAYING PROCEEDINGS.

PRINCIPAL.

When Liable for his Agent.]

See ACTION.

PRIVILEGED COMMUNICATION.

1. *Attorney and Client — Collateral Issue — Duty of Judge.*] In an action by the payee against the maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts and payments of her late husband, adding, “This from you will assist me in preparing the case for counsel,” whereupon the book in question was sent to the plaintiff. The judge, having heard the evidence, rejected the book:—

Held, that the communication was privileged. *Cleave v. Jones*, 554.

2. A judge is bound to decide the preliminary question of fact whether a communication is privileged or not; and his decision, if erroneous, may be reviewed. *Ib.*
3. Per *Martin, B.*, a communication by a client to his attorney made under a *bonâ fide*, although mistaken, belief of its being necessary to his case, is privileged. *Ib.*

PRODUCTION OF DOCUMENTS.

1. *Notice to Produce — Second Trial.*] A notice to produce documents, given in the ordinary form for the purpose of a former trial, and served before the first trial upon a party to the action, or his agent, may be used, as against such party, without re-service, on a new trial of the same cause. *Hope v. Beadon*, 326.
2. The legal effect of such a notice is, that it gives the party to the action, upon whom, or upon whose agent, it has been served, the option either to produce the documents named in it which were in his possession when it was served, or to admit the accuracy of any satisfactory evidence of the contents of those documents which may be produced on behalf of his adversary at the trial. *Ib.*

PROMISSORY NOTE.

1. *Delivery after Death of Maker.*] A, at his death, left among his papers two letters sealed, and directed to the plaintiff (who had been his housekeeper for some years, but had left his service after giving birth to a child, of which he was the father,) containing two promissory notes for 400*l.* and 200*l.* respectively. In one letter the note was said to be "in consideration of the long and faithful services of the plaintiff;" in the other he had written "in addition to any sum I owe you I inclose 200*l.* as a mark of my respect." The defendants, who were the executors of A, paid 200*l.* after his death, on account of these notes to the plaintiff, and promised, in writing, to pay the residue, but subsequently declined to do so; and the plaintiff brought an action of assumpsit against them, in which were counts upon the notes, and a count upon an account stated with the defendants as executors:—
Held, that the testator's estate was not liable in respect of the notes, as they had not been delivered by him to the plaintiff, and could not operate as testamentary dispositions, because not in conformity with the 1 & 2 Vict. c. 26, (the Wills Act.) *Gough v. Tindon*, 507.
2. *Account Stated — Payment under mistake as to legal Liability.*] *Held*, also, that the defendants were not liable upon the count for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration. *Ib.*

RAILWAY COMPANY.

1. *Excursion Tickets — Special Contract.*] Excursion tickets were issued by the G. N. Railway Company, at B., to convey passengers to L. and back, by any train advertised for that purpose, within the following fourteen days. B. was not on the line of the G. N. Railway Company, but on that of the S. Y. Railway Company, which joined the other line at D. Two trains a day (morning and evening,) were then advertised for the conveyance back from L., in pursuance of the notice on the ticket, but B. was not mentioned in the advertisement as one of the stations at which either of those trains would stop, although D. was so mentioned. H., who had taken one of the tickets at B., and had been conveyed to L., returned within the fourteen days by one of the evening trains, and on arriving at D. the next morning found that there was no train for B. on that day. He posted to B., and sued the company for the expense of so doing:—
Held, that he was entitled to recover. *Hawcroft v. The Great Northern Railway Company*, 362.
2. *Semble*, a railway company are not excused from carrying passengers according to their contract, upon the ground that there is no room for them in the train; but, in order to avail themselves of this answer, they should make their contract conditional upon there being room. *Ib.*
3. *Mortgage Deed — Property mortgaged — Principal Money, Right of Action for — Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 42, 50, and 53 — Local Acts, Construction of.*] A railway act, 7 & 8 Vict. c. 85, enacted, sect. 51, that if any interest due on any mortgage to the company should remain unpaid for thirty days after it had become due, and demand thereof had been made in writing, the mortgagee might sue for the interest in the superior courts, or require the appointment of a receiver. The 52d section enacted that if the principal money and interest were not paid within six months after it had become payable, and after demand in writing, the mortgagee might sue for the same in the superior courts. The 10 & 11 Vict. c. 174, (July 9, 1847,) repealed the above act, but by the 43d section re-enacted in substance the 52d section of the repealed act, so far as regarded the recovery of the interest due. The 10 & 11 Vict. c. 225, (July 22, 1847,) under which the money hereinafter mentioned was borrowed, enacted, sect. 8, that the several provisions in certain recited acts, amongst which was the repealed act, 7 and 8 Vict. c. 85, should apply to moneys "by this act authorized to be borrowed." The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, in sect. 50, that "the company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereon, and in such case the company shall

Common Law.

cause such period to be inserted in the mortgage deed or bond, and upon the expiration of such period the *principal sum* together with the arrears of interest thereon *shall*, on demand, be *paid* to the party entitled to such mortgage or bond. The defendants, a railway company, having borrowed 1000*l.* of the plaintiffs, executed to them a mortgage deed in the form given in schedule C, annexed to the Companies Clauses Act. The deed contained the following stipulation: "The principal sum to be paid on the 1st day of January, 1851."

An action having been brought by the plaintiffs to recover the principal sum lent:—*Held*, first, that the stipulation in the mortgage deed, that the principal sum was to be repaid on the 1st of January, 1851, imported a covenant by the defendants for the repayment of that sum on that day; that by virtue of that clause and of the Companies Clauses Act, sect. 50, if that sum were not repaid on the day fixed, the plaintiffs had a right of action for the recovery thereof, and that such right was not taken away, or affected by any other part of the Companies Clauses Act, or by the special acts. *Hart v. Eastern Union Railway Co.* 544.

Secondly, that the effect of the deed was to pledge the tolls and property of the company as proprietors, but not their stock or property as carriers, and that the judgment in any action brought against them for the recovery of the principal money would be satisfied out of their general property not comprised in the pledge belonging to them as carriers or otherwise. *Ib.*

Thirdly, that sect. 52 of the 7 & 8 Vict. c. 85, did not give a right of action for the principal money, but recognized it as already existing, and in addition to, or instead of that right, gave a right of having a receiver appointed; that, therefore, the repeal of that section would not take away any such right of action. *Ib.*

Lastly, that the existence of such right of action was also recognized by the 53d section of the Companies Clauses Act. *Ib.*

4. *Tolls—Construction of Agreement.*] In November, 1843, an agreement was made between "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway" and "The Bury and Rossendale Railway Company," as follows:—"It is hereby mutually agreed between the parties, &c.,—First, that they will mutually concur, coöperate, and aid, at the expense of the Bury and Rossendale Company, in obtaining an act of parliament, in the ensuing session, for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall. Secondly, that the Bury and Rossendale Railway Company shall have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine. Thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines, or any portions thereof,) between Salford and Rawtenstall, or any points interminate to these, shall be carried on, as it respects engine power and carriages, clerks, porters, and all other expenses, (except the maintenance of the Manchester and Bolton Railway,) at the cost and charge of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company for the use of their railway, and in respect to the traffic herein specified, a *pro rata* proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from said traffic, with no other deduction from the same than that hereinafter mentioned; and with this proviso, that nothing herein contained nor elsewhere provided shall authorize the Manchester and Bolton Railway Company to receive for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway in Salford; nevertheless the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway for a length of two miles, at the least. Fourthly, that previous to such apportionment of the gross rates, tolls, and proceeds referred to in clause three, the Bury and Rossendale Railway Company shall be entitled to deduct so much of the passenger duty as shall be paid by them; and afterwards further to deduct from the proceeds of all such of the said traffic as shall have been conveyed

Common Law.

in their carriages, wagons, and trucks, and by power provided at their expense, the further sum of 12½ per cent. and no more, from the proceeds arising from passenger traffic, including gentlemen's carriages, horses, and parcels, and 80 per cent. and no more, from the proceeds arising from merchandise or coal traffic, including stone." Subsequent to the execution of this agreement, the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway was incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company;" and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," was extended to some other places, and then became "The East Lancashire Railway Company;" and by divers subsequent acts of parliament certain other railways were incorporated with it, so as to form an extensive line of railways altogether. A special verdict having found that the length of the Manchester and Bolton Railway from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway, at Clifton, is four miles, and no more:—

Held, first, that on the true construction of the above agreement, the Lancashire and Yorkshire Railway Company were not entitled to charge the East Lancashire Railway Company that proportion for the whole amount received as tolls which that whole distance of two miles to be charged for on their part bears to the whole distance travelled on the line of the East Lancashire Company alone; but that the rate per mile for the charge was first to be settled by the relative distances actually travelled on each, and when so settled a distance of two miles was to be paid for at that rate. *Lancashire and Yorkshire Railway Co. v. East Lancashire Railway Co.* 564.

Secondly, that the agreement itself did not extend beyond the traffic along the Bury and Rossendale Railway alone to the traffic along the whole railway of the East Lancashire Railway Company. *Ib.*

RAILWAYS.

See CARRIERS.

RELEASE.

See FRAUD.

RULES.

Reg. Gen. Hil. T. 2 Will. 4, c. 59 314

SALE.

Conditions of.]

See VENDOR.

SECURITY.

See STAMP ACT.

SENTENCE.

In absence of Defendant.]

See NUISANCE.

SEQUESTRATION.

Fi. Fa.—Return—Irregularity—Time for setting aside.] Judgment having been
VOL. VIII. 55

Common Law.

obtained against the defendant, a beneficed clergyman in the county of Brecon, a writ of sequestration was issued against him on the 17th of August, at which time no writ of *fi. fa.* had been issued. On the 9th of October a *fi. fa.* against him was returned by the sheriff of Bristol *nulla bona*, but not that the defendant was a beneficed clerk. The rule to set aside the writ of sequestration was moved for on the 22d of November:—

Held, that the writ of sequestration was irregular, and that the application to set it aside was made in sufficient time. *Bromage v. Vaughan*, 562.

SERVANT.

When his Negligence affects Master.]

See ACTION.

SERVICE.

1. *Summons to appear before Justices — What Service sufficient.]* A summons to appear at eleven o'clock on the 2d April, before justices of the peace, at a place eight miles off, was left with the wife of W. on the morning of the 1st April, but after W. had gone to work as a collier. He was absent till eleven o'clock the same night, when the summons was first brought to his notice. Failing to appear, he was convicted, and sentenced to a month's imprisonment:—

Held, that the question of the sufficiency of the service of a summons was a matter upon which the justices were the proper parties to decide. *Williams, ex parte*, 336. *Semle*, such service was sufficient. *Id.*

SET-OFF.

See INSOLVENCY.

SHARES.

Transfer of.]

See DEED.

See PLEADING.

SPECIAL CONTRACT.

See RAILWAY COMPANY.

SPECIAL JURY.

See TRIAL.

STAMP ACT.

Mortgage — 55 Geo. 3, c. 184, *Sched. Part 1, "Mortgage" — Policy of Insurance.]* A being indebted to the defendant in 184l. 7s. 6d. mortgaged by deed certain furniture to him, and also signed a policy of assurance, with a proviso for redemption on payment of the principal money and interest. It was also provided that on default of payment, the defendant should have the power of taking and selling the furniture, and of reimbursing himself thereout for all costs and expenses, and also for all sums expended by him in keeping the policy on foot. Then followed a covenant by A for repayment to the defendant of 184l. 7s. 6d., and for payment to the insurance office of the premiums: that in case of avoidance of the policy, or the insolvency of the insurance company, A would insure in another office, and assign the new policy to the defendant; that in case of A's neglecting to pay the premium, the defendant

Common Law.

might pay it to the office, and that the sums advanced by the defendant for continuing the insurance should be considered as principal moneys and bear interest, and that the policy should be a security to the defendant for the repayment thereof, and should not be redeemed without payment to the defendant of the sum advanced and interest, as well as of the 184*l.* 7*s.* 6*d.* :—

Held, that such mortgage was not a "security for the repayment of money to be thereafter lent, advanced, or paid" to an amount "uncertain and without limit," within the Stamp Act, 55 Geo. 3, c. 184, sched. Part 1, tit. "Mortgage," and therefore that it did not require a stamp of 2*s.* *Lawrance v. Boston*, 494.

STATUTES CITED, EXPOUNDED, &c.

33 Hen. 8, c. 27	396
37 Hen. 8, c. 12	1
4 & 5 Will. & M. c. 18, s. 3	334
12 Anne 2, c. 16, s. 1	408
55 Geo. 3, c. 42, s. 7	18
55 Geo. 3, c. 184	494
59 Geo. 3, c. 12, s. 17	317
5 Geo. 4, c. 50, s. 30	329
5 Geo. 4, c. 83, s. 4	321
10 Geo. 4, c. 56, s. 9	369
2 & 3 Will. 4, c. 100	337
3 & 4 Will. 4, c. 27, ss. 5, 8	317
3 & 4 Will. 4, c. 42, s. 39	561
3 & 4 Will. 4, c. 98, s. 7	408, 531
5 & 6 Will. 4, c. 76, s. 17	303
5 & 6 Will. 4, c. 76, s. 32	356
5 & 6 Will. 4, c. 107	427
6 & 7 Will. 4, c. 71, s. 46	337
6 & 7 Will. 4, c. 111	587
7 Will. 4	358
1 Vict. c. 78, s. 14	358
1 & 2 Vict. c. 26	507
1 & 2 Vict. c. 92, s. 44	427
1 & 2 Vict. c. 110	334, 402, 420
2 & 3 Vict. c. 37, s. 1	408, 531
2 & 3 Vict. c. 47, s. 54	476
6 & 7 Vict. c. 18, s. 17	358
6 & 7 Vict. c. 36	298
7 & 8 Vict. c. 3, s. 50	427
7 & 8 Vict. c. 85	544
7 & 8 Vict. c. 101, s. 3	365
8 & 9 Vict. c. 10	365
8 & 9 Vict. c. 16, s. 10	359
8 & 9 Vict. c. 16, s. 19	351
8 & 9 Vict. c. 16, ss. 42, 50, 53	544
8 & 9 Vict. c. 109, s. 19	415
9 & 10 Vict. c. 95, s. 12	524
9 & 10 Vict. c. 95, s. 63	491
10 & 11 Vict. c. 174	544
10 & 11 Vict. c. 225	544
11 & 12 Vict. c. 31, s. 8	311
11 & 12 Vict. c. 31, s. 9	295
11 & 12 Vict. c. 45, s. 20	539
12 & 13 Vict. c. 45, s. 18	311
12 & 13 Vict. c. 106, ss. 224, 228, 230	370
13 & 14 Vict. c. 61	349
13 & 14 Vict. c. 61, s. 93	524
14 & 15 Vict. c. 19, s. 9	584, 587

STAYING PROCEEDINGS.

Payment of Debt and Costs.] A defendant, upon whom a writ of summons had been served, indorsed for 77l. 18s. 8d., applied to a judge at chambers to stay proceedings upon payment of that sum. Between the issuing of the writ and the hearing of the application the plaintiffs had sold certain wine, which had been deposited with them as collateral security for the payment of the bills upon which the action was brought, and they refused to take the whole amount indorsed upon the writ, but offered to take that sum less the amount realized by the sale of the wine. This the defendant would not consent to, alleging that the sale was fraudulent, and that he would be prejudiced by allowing the amount said to have been produced by it. The judge at chambers refused to make any order:—

Held, upon application to the court to stay proceedings upon payment of 77l. 18s. 8d., with interest and costs up to the time of the hearing at chambers, that the plaintiffs were not bound to accept from the defendant more than was actually due to them, although a larger sum than they now claimed had been indorsed upon the writ, and that the defendant could not be prejudiced in any cross claim which he might have by paying a less sum. *Arnold v. Goodered*, 332.

See WINDING-UP ACTS.

STET PROCESSUS.

See NONSUIT.

STREETS AND HIGHWAYS.

Meaning of those Words in 5 Geo. 4, c. 83.]

See ARREST.

SUB-CONTRACTOR.

When his Negligence affects Contractor.]

See ACTION.

SUMMONS AND PARTICULARS.

Sufficiency of.]

See PLEADING.

TAXATION.

See POOR-RATES.

TENANCY AT WILL.

See EJECTMENT.

TITHES.

1. *City of London*—"Assessment."] The clergy of the city of London were, by a decree made under the authority of an act of parliament, 37 Hen. 8, c. 12, declared entitled to 2s. 9d. in the pound of the rent by the year of all houses, shops, &c., as and for tithe. The Blackwall Railway Company's act empowered that company to

Common Law.

remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them from the railway taking down houses, &c., and until new houses should be erected on the ground which should be cleared, of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers, "according to the last assessment thereof to the 25th March last," and such sum or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company:—

Held, reversing the decision of Wigram, V. C., that where there had been an agreed rent but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound; that the object of the act was only to give indemnity to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the amount of tithes to be paid to the 25th March, 1839, had been understood, agreed, and settled. *London, &c. Railway Co. v. Letts*, 1.

2. *Held*, also reversing the decision of Wigram, V. C., that the amount of tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. *Id.*

3. *Held*, affirming Wigram, V. C., that the word "assessment" did not mean the assessment to the poor-rate. *Id.*

4. *Tithe Commutation Act—Payment for Tithes and Glebe—Invalid Modus.*] The question raised under the Tithe Commutation Act, 2 & 3 Will 4, c. 100, being, whether a modus or yearly sum of 20l. was payable to the rector of W. in satisfaction and discharge of all the tithes in R., and was become indefeasible by virtue of the statute, the jury found that the 20l. had been paid quarterly during the statutable period, not for the tithes alone, but partly for tithes and partly for glebe; and it was proved, that after the disabling statutes the rector of W. had been in possession of glebe lands in R.:—

Held, first, that by such finding it was clear that the sum of 20l. was not payable in lieu of tithes in R.

Secondly, that in such finding and evidence there was no sufficient proof of any valid modus or payment in lieu of tithes in R. *Young v. The Master, &c. of Clare Hall*, 337.

TOLLS.

See RAILWAY COMPANY.

TRIAL.

1. *Special Jury—5 Geo. 4, c. 50, s. 80—Mistrial by Common Jury.*] Defendant obtained a rule for a special jury, which was nominated and reduced, but no jury process issued. Afterwards plaintiff obtained a judge's order, by which the cause was to be tried as a common jury cause, and come on in its turn in the common jury list, but defendant was to be at liberty to try it before a special jury if he could procure their attendance on that day. The cause was tried by a common jury as undefended:—

Held, that the trial was irregular. *Montagu v. Smith*, 329.

2. *Notice of.]*

See NOTICE OF TRIAL.

Common Law.

TROVER.

1. *Mortgage of Goods — Determination of Bailment.*] A, by deed, dated the 28th of September, 1845, conveyed certain goods to B absolutely, subject to a proviso that if he should pay to B the sum secured on the 22d of March, 1850, or any earlier day, after receiving from B fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed it was also agreed that, until a default in payment of the principal as before specified or until default in payment of the interest after notice to pay, A, his executors and administrators, should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A, pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 13th of December, 1849, when he became bankrupt, and the defendants, who were his assignees, then took possession of the goods and sold them on the 19th of February, 1850. B had previously assigned the goods to the plaintiffs:—
Held, that although the right to the possession of the goods was vested in A until the 22d of March, 1850, (defeasible by non-payment of the principal and interest according to the provisions of the deed,) yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion for which the plaintiffs were entitled to maintain trover. *Fenn v. Bittleston*, 488.
2. *Fixtures.*] Trover will not lie for fixtures which a tenant has left annexed to the freehold after he has quitted possession, with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ruffey v. Henderson*, 305.

TRUST.

See WILL.

USURY.

1. *Exemptions — Bills at Three Months — Security on Land — Statutes 12 Anne 2, c. 16, s. 1; 3 & 4 Will. 4, c. 98, s. 7; 2 & 3 Vict. c. 37, s. 1.*] The statute 3 & 4 Will. 4, c. 98, s. 7, which exempted from the provisions of the Usury Act, (12 Anne 2, c. 16, s. 1,) bills of exchange not having more than three months to run, is not repealed by the statute 2 & 3 Vict. c. 37, s. 1, which, and the statutes continuing it, exempt from the operation of the usury laws all bills not having more than twelve months to run and all contracts above £10, provided there be no security upon land.
 Therefore, bills not having more than three months to run, though for more than £5 per cent. interest, and though there be further security on land, are not void. *Clack v. Sainsbury*, 408.
2. *Bill of Exchange — 3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, s. 1.*] A bill of exchange at three months, made to secure the repayment of money lent by the plaintiff at interest exceeding 5l. per cent., is not invalidated by reason of the plaintiff holding the security of land also for the repayment within the 3 & 4 Will. 4, c. 98, s. 7, and the 2 & 3 Vict. c. 37, s. 1. *Nixon v. Phillips*, 531.

VAGRANT ACT.

Construction of.]

See ARREST.

VENDOR AND PURCHASER.

Conditions of Sale — Description of Parcels — Identity — Quantity.] A contract of

Common Law.

sale described the property purchased as "The cottage and paddock comprising 1 a. 2 r. 8 p. situate at, &c., described in the particulars as lot 1." The description of lot 1, in the particulars was, "The property comprises 1 a. 2 r. 8 p. situate, &c., consisting of a cottage and paddock in the occupation of Mr. P." By the contract of sale, the title and conveyance were to be completed according to the conditions of sale. One of these was, "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated whether more or less (although the title-deeds state such quantity to be less) without any compensation on either side. And no other evidence of identity shall be required than that furnished by the title-deeds, and the statements therein shall be deemed conclusive evidence of the identity of the property." On default of completion the deposit-money was to be forfeited. The vendor delivered an abstract of title to 3 r. 22 p. only:—

Held, that the mere fact of a title to land described as consisting of 3 r. 22 p. being made by the vendor, did not, under the circumstances authorize the purchaser to contend that the title had not been made according to the conditions of sale, and that he was bound to complete. *Nicholl v. Chambers*, 423.

VENUE.

See EMBEZZLEMENT.

WARRANT OF ATTORNEY.

Attestation by Attorney named in the Warrant—Issuing Execution for Plaintiff.] A warrant of attorney, prepared by the defendant, was addressed to H., an attorney, by name. The plaintiff introduced H. to the defendant, who adopted him as his attorney to attest the execution of the warrant of attorney, and H. accordingly attested it. H. afterwards, at the request of the plaintiff, signed judgment and issued execution on the warrant as attorney for the plaintiff.

The court refused to set aside the warrant on the objection that the attestation by H. was insufficient. *Levinson v. Syer*, 378.

WAY.

Indictment for Non-repair of.]

See INDICTMENT.

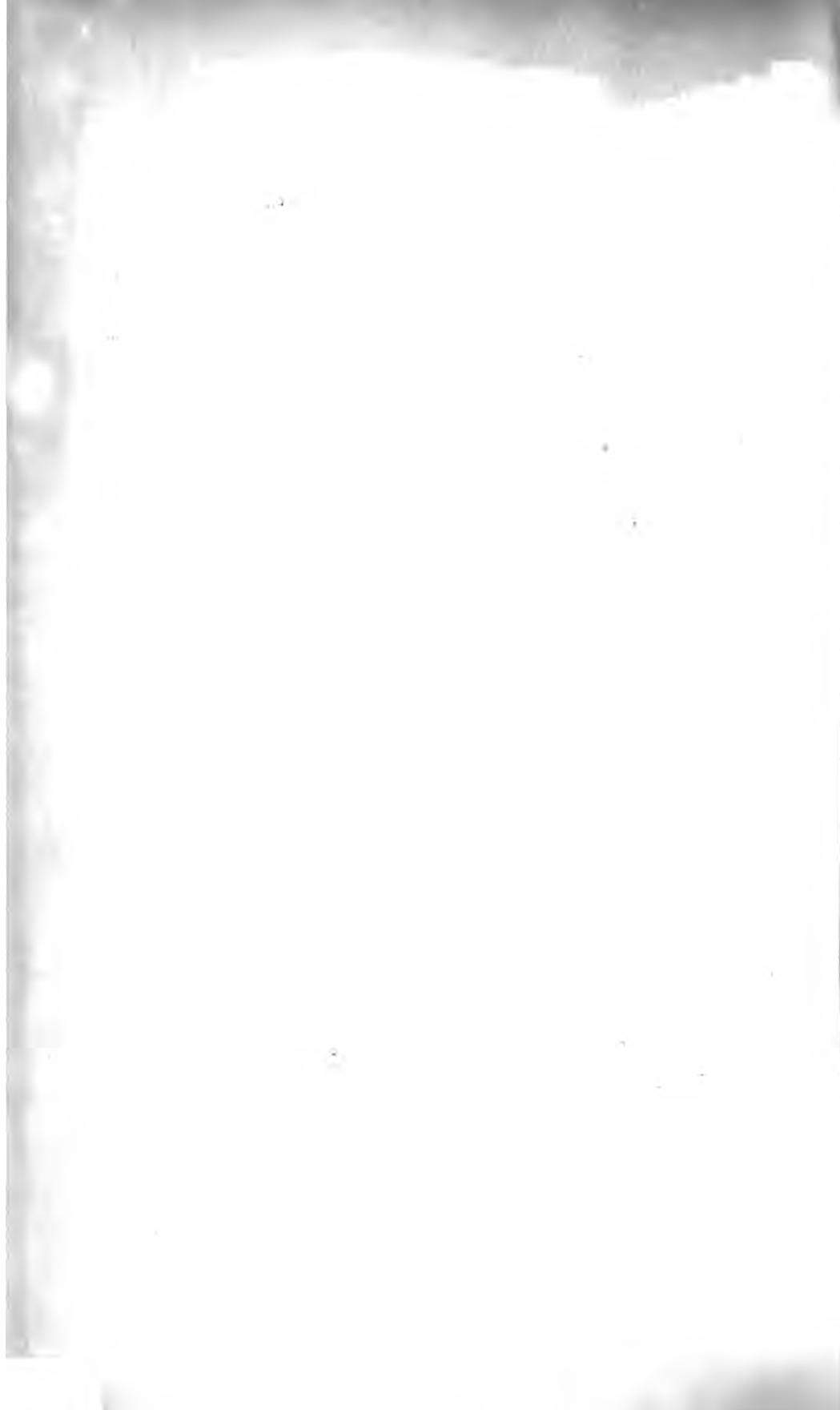
WILL.

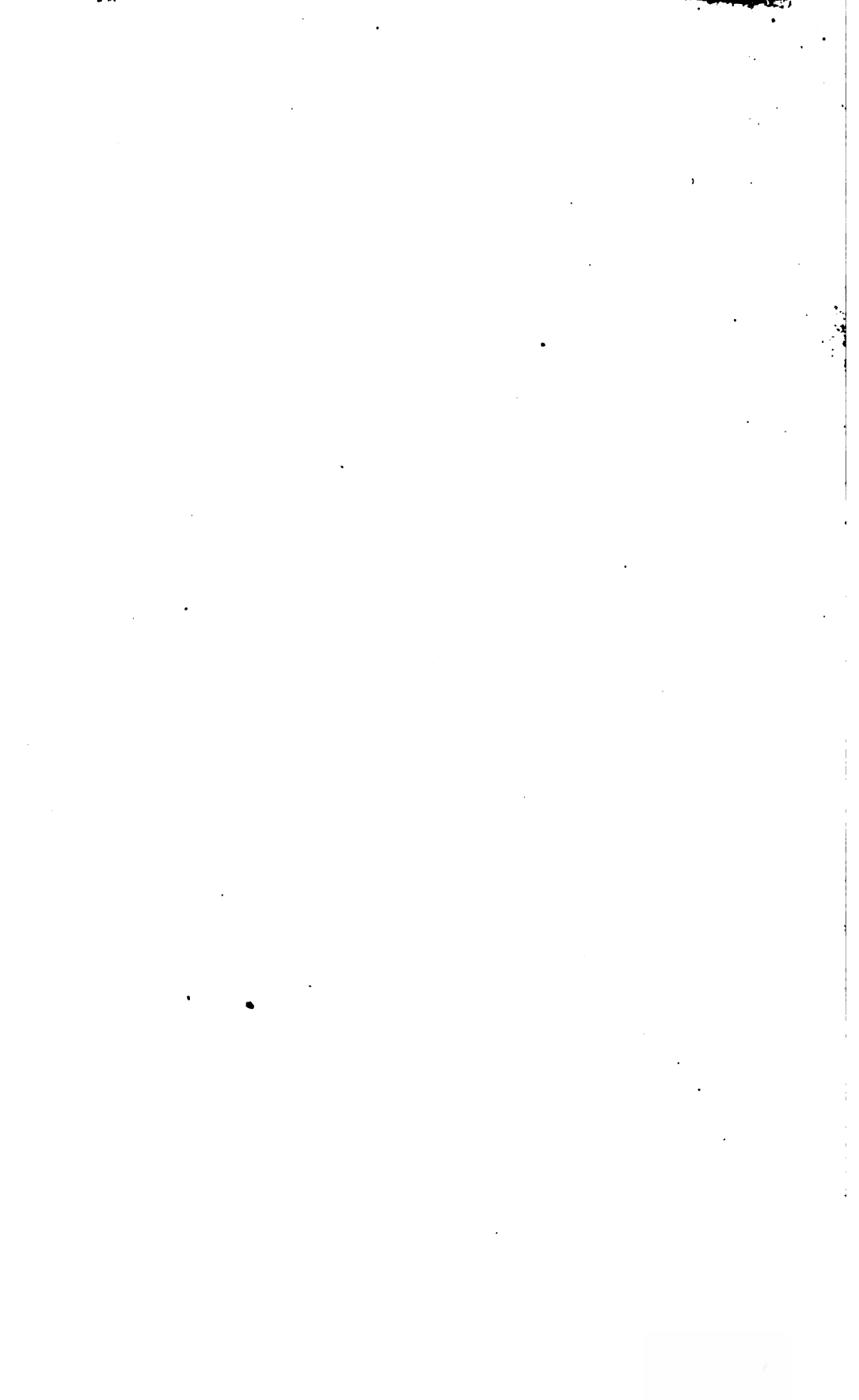
Legacy—Liability of Executor to account—Trust for Children.] A testator made his will in these terms:—"I give and bequeathe all my property, of whatsoever description, to my wife, for the maintenance of herself and our children," naming them, and making her sole executrix:—

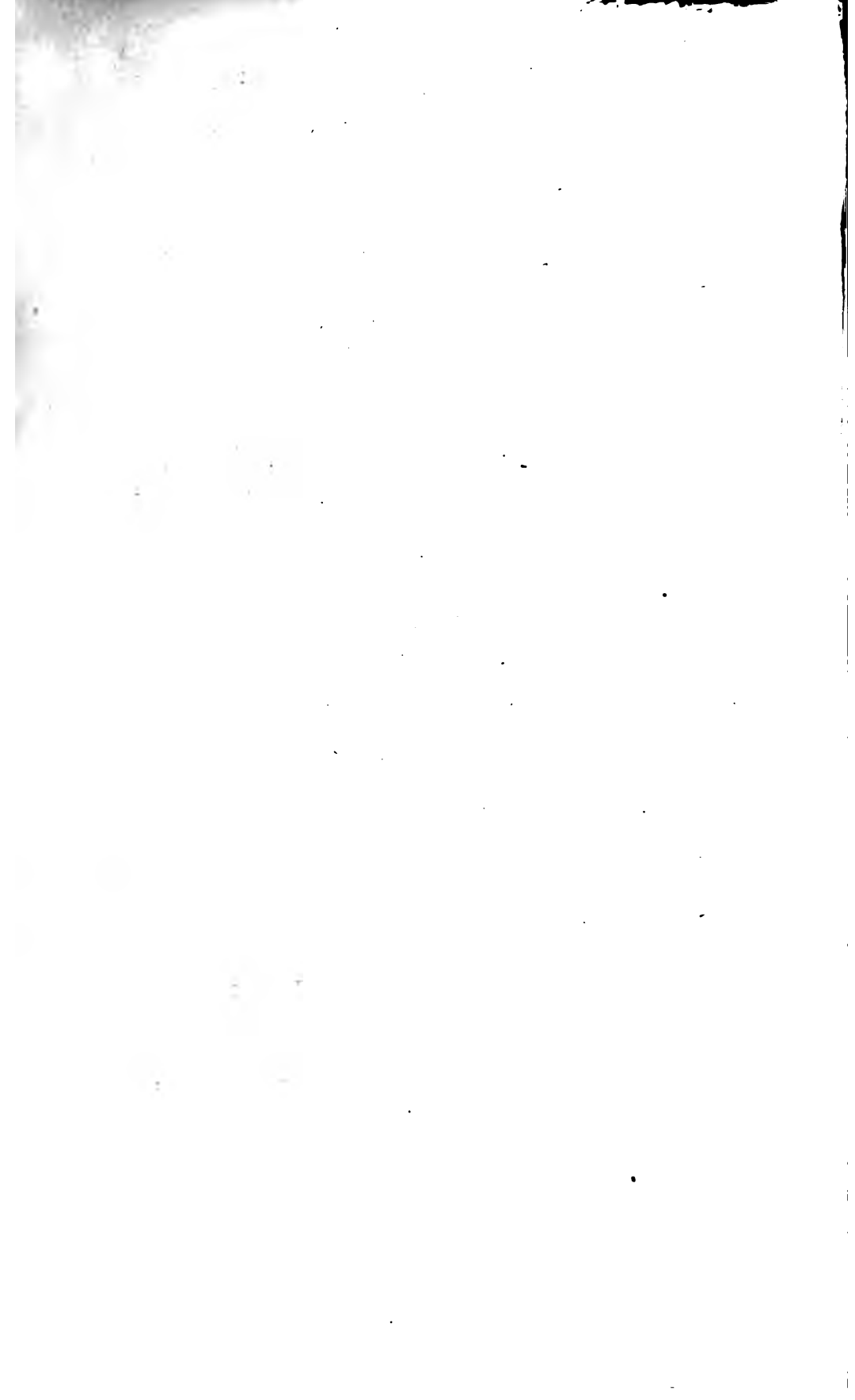
Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account. *Harris*, in re, 537.

WINDING-UP ACT.

Interim Manager—Staying Proceedings in Action against Company.] An interim manager appointed under the Winding-up Act (11 & 12 Vict. c. 45, s. 20,) is not an official manager within the 73d section; and, therefore, the court will not, under that section, stay proceedings in an action against the company ordered to be wound up, or other person representing the company, unless an official manager has been appointed. *Brettle v. Dawes*, 539.







Stanford Law Library



3 6105 062 791 020

STAYING PROCEEDINGS.

Payment of Debt and Costs.] A defendant, upon whom a writ of summons had been served, indorsed for 77*l.* 18*s.* 8*d.*, applied to a judge at chambers to stay proceedings upon payment of that sum. Between the issuing of the writ and the hearing of the application the plaintiffs had sold certain wine, which had been deposited with them as collateral security for the payment of the bills upon which the action was brought, and they refused to take the whole amount indorsed upon the writ, but offered to take that sum less the amount realized by the sale of the wine. This the defendant would not consent to, alleging that the sale was fraudulent, and that he would be prejudiced by allowing the amount said to have been produced by it. The judge at chambers refused to make any order:—

Held, upon application to the court to stay proceedings upon payment of 77*l.* 18*s.* 8*d.*, with interest and costs up to the time of the hearing at chambers, that the plaintiffs were not bound to accept from the defendant more than was actually due to them, although a larger sum than they now claimed had been indorsed upon the writ, and that the defendant could not be prejudiced in any cross claim which he might have by paying a less sum. *Arnold v. Goodered*, 832.

See WINDING-UP ACTS.

STET PROCESSUS.

See NONSUIT.

STREETS AND HIGHWAYS.

Meaning of those Words in 5 Geo. 4, c. 83.]

See ARREST.

SUB-CONTRACTOR.

When his Negligence affects Contractor.]

See ACTION.

SUMMONS AND PARTICULARS.

Sufficiency of.]

See PLEADING.

TAXATION.

See POOR-RATES.

TENANCY AT WILL.

See EJECTMENT.

TITHES.

1. *City of London*—“*Assessment.*”] The clergy of the city of London were, by a decree made under the authority of an act of parliament, 37 Hen. 8, c. 12, declared entitled to 2*s.* 9*d.* in the pound of the rent by the year of all houses, shops, &c., as and for tithe. The Blackwall Railway Company's act empowered that company to

Common Law.

remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them from the railway taking down houses, &c., and until new houses should be erected on the ground which should be cleared, of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers, "according to the last assessment thereof to the 25th March last," and such sum or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company:—

Held, reversing the decision of Wigram, V. C., that where there had been an agreed rent but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound; that the object of the act was only to give indemnity to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the amount of tithes to be paid to the 25th March, 1839, had been understood, agreed, and settled. *London, &c. Railway Co. v. Letts*, 1.

2. *Held*, also reversing the decision of Wigram, V. C., that the amount of tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. *Ib.*

3. *Held*, affirming Wigram, V. C., that the word "assessment" did not mean the assessment to the poor-rate. *Ib.*

4. *Tithe Commutation Act—Payment for Tithes and Glebe—Invalid Modus.*] The question raised under the Tithe Commutation Act, 2 & 3 Will. 4, c. 100, being, whether a modus or yearly sum of 20*l.* was payable to the rector of W. in satisfaction and discharge of all the tithes in R., and was become indefeasible by virtue of the statute, the jury found that the 20*l.* had been paid quarterly during the statutable period, not for the tithes alone, but partly for tithes and partly for glebe; and it was proved, that after the disabling statutes the rector of W. had been in possession of glebe lands in R.:—

Held, first, that by such finding it was clear that the sum of 20*l.* was not payable in lieu of tithes in R.

Secondly, that in such finding and evidence there was no sufficient proof of any valid modus or payment in lieu of tithes in R. *Young v. The Master, &c. of Clare Hall*, 337.

TOLLS.

See RAILWAY COMPANY.

TRIAL.

1. *Special Jury—5 Geo. 4, c. 50, s. 80—Mistrial by Common Jury.*] Defendant obtained a rule for a special jury; which was nominated and reduced, but no jury process issued. Afterwards plaintiff obtained a judge's order, by which the cause was to be tried as a common jury cause, and come on in its turn in the common jury list, but defendant was to be at liberty to try it before a special jury if he could procure their attendance on that day. The cause was tried by a common jury as undefended:—

Held, that the trial was irregular. *Montagu v. Smith*, 329.

2. *Notice of.*]

See NOTICE OF TRIAL.

Common Law.

TROVER.

1. *Mortgage of Goods—Determination of Bailment.*] A, by deed, dated the 28th of September, 1845, conveyed certain goods to B absolutely, subject to a proviso that if he should pay to B the sum secured on the 22d of March, 1850, or any earlier day, after receiving from B fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed it was also agreed that, until a default in payment of the principal as before specified or until default in payment of the interest after notice to pay, A, his executors and administrators, should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A, pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 13th of December, 1849, when he became bankrupt, and the defendants, who were his assignees, then took possession of the goods and sold them on the 19th of February, 1850. B had previously assigned the goods to the plaintiffs:—
Held, that although the right to the possession of the goods was vested in A until the 22d of March, 1850, (defeasible by non-payment of the principal and interest according to the provisions of the deed,) yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion for which the plaintiffs were entitled to maintain trover. *Fenn v. Bittleston*, 488.
2. *Fixtures.*] Trover will not lie for fixtures which a tenant has left annexed to the freehold after he has quitted possession, with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ruffey v. Henderson*, 305.

TRUST.

See WILL.

USURY.

1. *Exemptions—Bills at Three Months—Security on Land—Statutes 12 Anne 2, c. 16, s. 1; 3 & 4 Will. 4, c. 98, s. 7; 2 & 3 Vict. c. 37, s. 1.*] The statute 3 & 4 Will. 4, c. 98, s. 7, which exempted from the provisions of the Usury Act, (12 Anne 2, c. 16, s. 1,) bills of exchange not having more than three months to run, is not repealed by the statute 2 & 3 Vict. c. 37, s. 1, which, and the statutes continuing it, exempt from the operation of the usury laws all bills not having more than twelve months to run and all contracts above £10, provided there be no security upon land.
 Therefore, bills not having more than three months to run, though for more than £5 per cent. interest, and though there be further security on land, are not void. *Clack v. Sainsbury*, 408.
2. *Bill of Exchange—3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, s. 1.*] A bill of exchange at three months, made to secure the repayment of money lent by the plaintiff at interest exceeding 5l. per cent., is not invalidated by reason of the plaintiff holding the security of land also for the repayment within the 3 & 4 Will. 4, c. 98, s. 7, and the 2 & 3 Vict. c. 37, s. 1. *Nixon v. Phillips*, 531.

VAGRANT ACT.

Construction of.]

See ARREST.

VENDOR AND PURCHASER.

Conditions of Sale—Description of Parcels—Identity—Quantity.] A contract of

Common Law.

sale described the property purchased as "The cottage and paddock comprising 1 a. 2 r. 8 p. situate at, &c., described in the particulars as lot 1." The description of lot 1, in the particulars was, "The property comprises 1 a. 2 r. 8 p. situate, &c., consisting of a cottage and paddock in the occupation of Mr. P." By the contract of sale, the title and conveyance were to be completed according to the conditions of sale. One of these was, "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated whether more or less (although the title-deeds state such quantity to be less) without any compensation on either side. And no other evidence of identity shall be required than that furnished by the title-deeds, and the statements therein shall be deemed conclusive evidence of the identity of the property." On default of completion the deposit-money was to be forfeited. The vendor delivered an abstract of title to 8 r. 22 p. only :—
Held, that the mere fact of a title to land described as consisting of 3 r. 22 p. being made by the vendor, did not, under the circumstances authorize the purchaser to contend that the title had not been made according to the conditions of sale, and that he was bound to complete. *Nicholl v. Chambers*, 423.

VENUE.

See EMBEZZLEMENT.

WARRANT OF ATTORNEY.

Attestation by Attorney named in the Warrant—Issuing Execution for Plaintiff.] A warrant of attorney, prepared by the defendant, was addressed to H., an attorney, by name. The plaintiff introduced H. to the defendant, who adopted him as his attorney to attest the execution of the warrant of attorney, and H. accordingly attested it. H. afterwards, at the request of the plaintiff, signed judgment and issued execution on the warrant as attorney for the plaintiff.
 The court refused to set aside the warrant on the objection that the attestation by H. was insufficient. *Levinson v. Syer*, 378.

WAY.

Indictment for Non-repair of.]

See INDICTMENT.

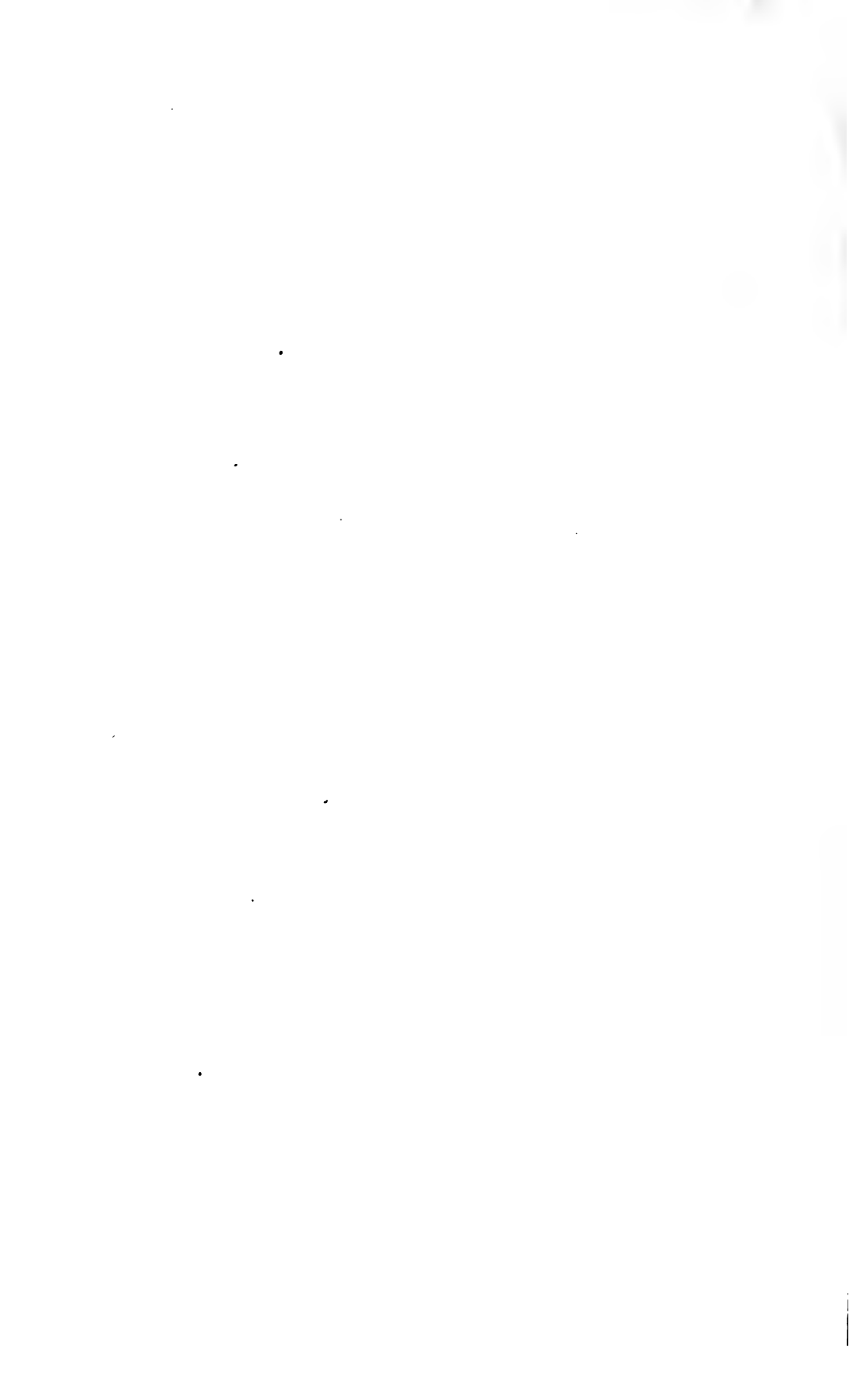
WILL.

Legacy—Liability of Executor to account—Trust for Children.] A testator made his will in these terms :—"I give and bequeathe all my property, of whatsoever description, to my wife, for the maintenance of herself and our children," naming them, and making her sole executrix :—
Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account. *Harris*, in re, 537.

WINDING-UP ACT.

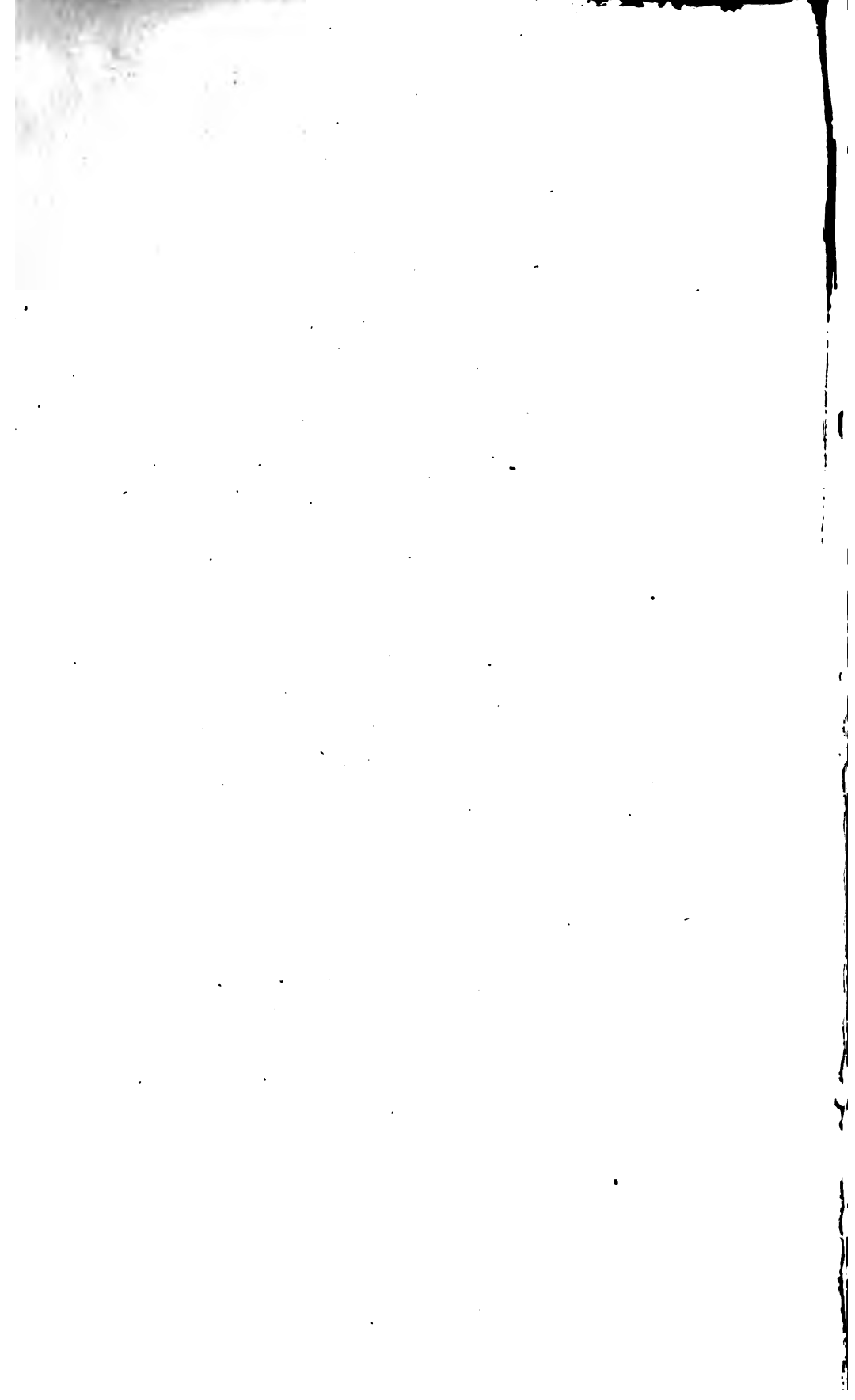
Interim Manager—Staying Proceedings in Action against Company.] An interim manager appointed under the Winding-up Act (11 & 12 Vict. c. 45, s. 20,) is not an official manager within the 73d section; and, therefore, the court will not, under that section, stay proceedings in an action against the company ordered to be wound up, or other person representing the company, unless an official manager has been appointed. *Brettell v. Dawes*, 539.

52









Stanford Law Library



3 6105 062 791 020

